United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2328

Nos. 74-2462, 74-2463, 74-2464

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

HARRY BERNSTEIN, ROSE BERNSTEIN and EASTERN SERVICE CORPORATION,
Defendants-Appellants.

BRIEF OF APPELLANTS HARRY BERNSTEIN, ROSE BERNSTEIN AND EASTERN SERVICE CORPORATION

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UNITED STATES OF AMERICA,
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VS.

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Defendants-Appellants.

BRIEF OF APPELLANTS HARRY BERNSTEIN, ROSE BERNSTEIN AND EASTERN SERVICE CORPORATION

Statement of Issues Presented for Review.

1. Whether it was error for the District Judge to refuse to disqualify himself.

2. Whether the case as conceived, structured and tried deprived the defendants-appellants of a fair trial.

3. Whether the District Court erred in submitting to the jury as a question of fact the duty of the defendants Eastern Service Corporation and Harry Bernstein with

respect to statements submitted to the Federal Housing Authority.

4. Whether the District Court erred in equating "poor credit judgment" with a false statement.

5. Whether the indictment charged a crime under 18 U.S.C. § 1010.

6. Whether the proof was sufficient to justify a conviction of Eastern Service Corporation with respect to the bribery counts.

7. Whether the Court properly charged the jury with respect to the alleged conspiracy.

8. Whether the Court's charge on all the counts was sufficient.

9. Whether the joinder of the defendants and counts was proper and whether defendants' motions for severance should have been granted.

10. Whether on an over-all basis in the light of the many errors committed by the District Judge this case should be reversed in its entirety and remanded for retrial.

Statement of the Case

These are appeals by the defendants Harry Bernstein, Rose Bernstein and Eastern Service Corporation from judgments of conviction entered upon the verdict of a jury after a trial in the Eastern District of New York at which Judge Anthony J. Travia presided.

On June 25, 1974, the defendant Harry Bernstein was convicted of conspiracy, 16 counts of bribery and one count of submitting false statements to the Federal Housing Administration in connection with applications for mortgage

insurance in violation of Title 18, United States Code, Section 371, Section 201(b)(1) and Section 1010 (21894 et seq., C978).* On October 4, 1974, the defendant Harry Bernstein was sentenced to five years imprisonment and fined a total of $175,000 (C1084). On June 25, 1974, the defendant Rose Bernstein was convicted of conspiracy and four counts of bribery in violation of Title 18, United States Code, Section 371 and Section 201(b)(1) (21902 et seq., C986). On October 4, 1974, the defendant Rose Bernstein was sentenced to four years imprisonment and fined a total of $50,000 (C1085). On June 25, 1974, the defendant Eastern Service Corporation was convicted of conspiracy, 18 counts of bribery and 18 counts of submitting false statements to the Federal Housing Administration in connection with applications for mortgage insurance in violation of Title 18, United States Code, Section 371, Section 201(b)(1) and Section 1010 (21907 et seq., C991) On October 4, 1974, the defendant Eastern Service Corporation was fined a total of $460,000 (C1083).

Execution of sentence was stayed pending defendants' appeal from the convictions. Notices of appeal from the judgments of conviction were filed by defendants-appellants on October 8, 1974, and the record on appeal was promptly docketed.

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* A word about the record and record references is in order. The record consists of four printed volumes of documents in the records filed in connection with petitions for writs of mandamus in the case styled *United States v. Bernstein, et al.*, docket numbers 73-1456, 73-1591, 73-2251, 73-2429, 73-2477, 73-2478, and the stenographic transcript of the trial. Accordingly, the letters "A" or "B", accompanied by a number, refer to these four printed volumes, and a number without a letter refers to the stenographic transcript of the trial. Reference to the two volume appendix filed in connection with this appeal containing further pretrial proceedings, docket entries, the redacted indictment and the charge of the court will carry the prefix "C".

Further Statement of the Case

On March 29, 1972 the grand jury in the Eastern District of New York returned a 150 count indictment, No. 72 CR 349, against Harry Bernstein, Rose Bernstein, Eastern Service Corporation and 20 additional defendants. This was one of many indictments returned on the same day against the Bernsteins, Eastern Service Corporation and various other defendants (B11 et seq.). On May 22, 1972 the grand jury returned indictment No. 72 CR 587 containing 211 counts superseding indictment No. 72 CR 349. This was one of 13 superseding indictments against the Bernsteins, Eastern Service Corporation and other defendants. They were numbered No. 72 CR 587 through No. 72 CR 599 and thereafter referred to as "related cases." The indictment No. 72 CR 587, later in some respects redacted, was the indictment on which the defendants-appellants were tried (C118-142). Thus, on and after May 29, 1972 the defendants Bernstein and Eastern Service Corporation were confronted with the following:

Defendants	*Indictments*	*Counts Charged*	*Items Involved*
Harry Bernstein	13	388	57,424
Rose Bernstein	13	420	62,160
Eastern Service Corporation	13	486	71,228*

Indictment No. 72 CR 587 on which Mr. and Mrs. Bernstein and Eastern Service Corporation were tried was in effect amended by the redacting (C118-142) as follows:

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* These figures are taken from a chart contained in an affidavit of the assistant United States attorney in opposition to defendants' motion for dismissal of the indictment (see A394). The multiplicity of the matters and things involved and the impossibility of preparing to defend in such an overwhelming situation appears from the face of the indictments.

Count Thirty-six became Count Two; Count Thirty-seven became Count Three; Count Twenty-eight became Count Four; Count Twelve became Count Five; Count Thirteen became Count Six; Count Forty became Count Seven; Count Forty-one became Count Eight; Count Fifty-nine became Count Nine; Count Ten remained Count Ten; Count Eleven remained Count Eleven; Count Two became Count Twelve; Count Three became Count Thirteen; Count Four became Count Fourteen; Count Five became Count Fifteen; Count Eighty-nine became Count Sixteen; Count Fifty-five became Count Seventeen; Count Forty-six became Count Eighteen; Count Forty-seven became Count Nineteen; Count Six became Count Twenty; Count Twenty-six became Count Twenty-one; Count Twenty-seven became Count Twenty-two; Count Eighteen became Count Twenty-three; Count Nineteen became Count Twenty-four; Count Twenty became Count Twenty-five; Count Twenty-one became Count Twenty-six; Count Fourteen became Count Twenty-seven; Count Twenty-four became Count Twenty-eight; Count Ninety-seven became Count Twenty-nine; Count Ninety-eight became Count Thirty; Count Thirty-two became Count Thirty-one; Count Thirty-three became Count Thirty-two; Count Thirty-four became Count Thirty-three; Count Thirty-five became Count Thirty-four; Count Sixty became Count Thirty-five; Count One Hundred Seven became Count Thirty-six; Count One Hundred One became Count Thirty-seven; Count Seventy-two became Count Thirty-eight; Count One Hundred Fifteen became Count Thirty-nine; Count One Hundred Seventeen became Count Forty; Count One Hundred Eighteen became Count Forty-one; Count One Hundred Twenty-one became Count Forty-two; Count One Hundred Twenty-three became Count Forty-three; Count One Hundred Twenty-six became

Count Forty-four; Count One Hundred Twenty-eight became Count Forty-five; Count One Hundred Twenty-nine became Count Forty-six; Count One Hundred Thirty-one became Count Forty-seven; Count One Hundred Thirty-four became Count Forty-eight; Count One Hundred Thirty-six became Count Forty-nine; Count One Hundred Forty-six became Count Fifty; Count One Hundred Fifty-three became Count Fifty-one; Count One Hundred Fifty-five became Count Fifty-two; Count One Hundred Fifty-six became Count Fifty-three; Count One Hundred Fifty-eight became Count Fifty-four; Count One Hundred Sixty-nine became Count Fifty-five; Count One Hundred Seventy-one became Count Fifty-six; Count One Hundred Seventy-two became Count Fifty-seven; Count One Hundred Seventy-four became Count Fifty-eight; Count One Hundred Seventy-eight became Count Fifty-nine; Count One Hundred Eighty became Count Sixty; Count One Hundred Ninety-six became Count Sixty-one; Count One Hundred Ninety-eight became Count Sixty-two; Count Two Hundred became County Sixty-three; Count Two Hundred Two became Count Sixty-four and Count Two Hundred Seven became Count Sixty-five (C118-142).

The redacting (to use the word again) was of little benefit to anyone; least of all the defendants because the Court proceeded to rule that all the counts of all the indictments could be the subject of proof by the Government on the theory of similar acts (380-381, 12005-9, 12132-41, 12310-26, 12793, 12607-17). Furthermore, the Court ruled that all 210 substantive counts of the superseding indictment could be proved as overt acts under count one of the redacted indictment (380, 387, 394, 395, 399). Thus, the defendants had to be prepared to defend the details of transactions involving hundreds of pieces of property and items of

information pertaining to these properties, aggregating upwards of 190,812.* Realistically and effectively, no one could do this. The Government's bill of particulars numbered approximately 200 pages (see B692-B881).**

Motions were timely made to sever various of the defendants and to reduce the indictment to manageable size. These motions and the proceedings thereon led to a redacting of the indictment.***

The trial commenced on October 15, 1973. The case was submitted to the jury on June 17, 1974. The Court commenced its charge (21206-21622, C285-713) to the jury on June 13, 1974 and concluded it in the afternoon of June 17, 1974. Counsel for Mr. Bernstein had finished his summation on May 22, 1974 more than three weeks before the Court's charge. In the interim counsel for the Government had devoted several days to his summation (20229-21101).

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* In its summation Government's counsel referred to millions of papers in evidence. (20691)

** We ask the members of the court to go back in thought and memory to their own trial days and read the bill of particulars and then consider how in the world preparation to meet the charges could be accomplished.

*** An account of the proceedings leading to the redacting would itself extend this brief beyond permissible limits. See 235-281, 300-312, 366-405, 579, 1936-1943.

Facts

The defendant Eastern Service Corporation, of which the defendant Harry Bernstein is the president and who, through an intermediate holding company is the sole stockholder,* is and for many years last past has been an approved mortgagee of the Federal Housing Administration (FHA) (2214-2217). It is engaged in the business of making loans as an initial or interim lender to assist purchasers of houses (2220). It takes mortgages executed by such purchasers covering houses purchased by them and discounts such mortgages with permanent lenders—savings banks, pension funds, etc. (10636). It aids purchasers who might otherwise not be able to purchase a home by advancing the funds beyond a down payment to effect the purchase. If the purchaser in a given instance is unable to make a down payment sufficiently large to justify the down payment required in connection with conventional financing, Eastern Service Corporation assists such purchaser in making application to the FHA for mortgage insurance, covering a mortgage which will enable him to make the purchase. In this connection the purchaser or applicant furnishes, through Eastern Service Corporation and to the FHA, detailed information concerning himself (2365, 2397) and the property which he proposes to purchase (2364). Eastern Service Corporation then requests a credit report covering the applicant to be furnished by a credit reporting agency approved by the FHA, such as Dun & Bradstreet.** When

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* The defendant Rose Bernstein, the wife of Harry Bernstein, is in no wise connected with Eastern Service Corporation. She is not an officer, director or stockholder. She had a real estate brokerage business of her own (14176-80).

** Dun & Bradstreet furnishd all of the credit reports involved in this case. It is the most prestigious reporting agency in the United States.

the credit report, which is paid for by Eastern Service Corporation, is received, it is associated with the information furnished by the applicant, which information is processed for completeness and checked for conformance with the instructions and forms furnished by the FHA. The "package"* (2362) of papers is then forwarded by Eastern Service Corporation to the FHA (2225). Upon receipt of the application and credit report the FHA causes an appraisal to be made of the property by either a staff appraiser (one on the regular payroll of FHA) or an outside appraiser (one retained on a fee basis from time to time to make particular appraisals). Upon receipt of the appraisal report and other information (2374-2376), including, importantly, the credit report (2376), constituting part of the application for an insured mortgage, the FHA makes a determination as to whether or not the application for an insured mortgage should be granted (2226, 2397-2453). The procedures for making an application for mortgage insurance to the FHA are outlined in Government's exhibits 145 and 147 received in evidence at 2219 and 2234, respectively. The procedure is described in some detail by the witnesses George Hipps (2206-2336) and Vaughn Sanders (2337-3014) and also by the witness Milton Francis (14727-15355). See Point III, *infra*.

Eastern Service Corporation, which serviced between 2,500 and 4,000 applications per year (20459-60), had approximately 140 employees. It had salesmen, sometimes referred to as mortgage solicitors, who called upon licensed real estate brokers soliciting business. The defendant Melvin Cardona was employed in such capacity (10724-5).

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* This is the term often used throughout the testimony (2359, 21386).

The corporation had a processing department which, as the name implies, processed the many applications for mortgage insurance which were forwarded to the FHA. The defendant Florence Behar was the processing supervisor (10630).

Sometime in the summer of 1967 the defendant Cardona met Ortrud Kapraki (3041),* a real estate broker (3029). Upon learning from Mrs. Kapraki that prospective purchasers of property owned by her and customers of hers were having difficulty in financing purchases (3040), Cardona explained the function of the FHA with respect to insuring mortgages and the role of Eastern Service Corporation as an approved mortgagee, furnishing interim financing for purchasers (3045-6). He explained the mechanics involved in making application to the FHA for mortgage insurance (3046). Soon thereafter Mrs. Kapraki began to apply for mortgage insurance through Eastern Service Corporation (3079). Since a great many applications were being made, both through Eastern Service Corporation and other approved mortgagees, there was a time lag between the making of a proposed deal for the sale of a house and the obtaining of mortgage insurance with respect to the mortgage to be given by the purchaser. Mrs. Kapraki, desiring to expedite the applications in which she was interested, offered to pay, and thereafter proceeded to surreptitiously pay, to the defendant Florence Behar varying sums of money to expedite the processing at Eastern Service Corporation of her applications (3099-3102). She also paid money to other clerical employees of Eastern Service Corporation for the same purpose (3103-04). In the course of time false and exaggerated statements began to creep into

* An indicted defendant who pled guilty and testified for the government.

various of Mrs. Kapraki's applications. These false statements became more extensive and aggravated as time went on (3224-28, 3251, 3255, 3262, 3270, 3285). There was no claim that Florence Behar or anyone connected with Eastern Service Corporation, other than Melvin Cardona, knew about the false statements (20640-41, 18742). There was no evidence, in fact no claim by the Government, that Mr. Bernstein had actual knowledge of the false statements (18742, 20640-42). The charge against Mr. Bernstein was that he was negligent in not discovering such false statements. See Point III, *infra*.

Wholly apart and completely separate from his interest in Eastern Service Corporation, the defendant Harry Bernstein was financially interested in several pieces of property on his own account (12144-13002). With respect to some of these properties he owned the fee. In other instances he owned the mortgage, sometimes a second mortgage. On occasions applications were made for mortgage insurance on mortgages covering these properties.* On occasions and apropos of applications for mortgage insurance covering mortgages on these properties, an FHA staff appraiser by the name of Edward Goodwin made appraisals. Goodwin testified to some $50 payments to him for "getting Mr. Bernstein the top dollar" in the way of mortgage insurance for mortgages on these properties by inflating their value in his appraisals (11965, 12545, 12653). These payments are charged as bribes and are the subject of many of the so-called bribery counts in the indictment on which Mr. Bernstein and Eastern Service Corporation were convicted. See discussion under Point V, *infra*.

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* No one of these applications is alleged to contain false statements and no one of these properties is involved in the so-called false statement counts of the indictment.

Goodwin, prior to his employment by the FHA, had himself bribed FHA and other federal appraisers (13106). There came a time when Mrs. Kapraki met Goodwin and she proceeded to bribe him with respect to her properties (5187, 5204, 5374, 5306, 5317). A charge is made that Mr. and Mrs. Bernstein and Eastern Service Corporation aided and abetted Mrs. Kapraki in so doing (Counts 35, 36, 37, 38).

The Government charged an over-all comprehensive conspiracy which included not only Mr. and Mrs. Bernstein, Eastern Service Corporation and Mrs. Kapraki (and various of her employees), but Dun & Bradstreet, the manager of its Hicksville office and certain FHA personnel as well. The jury disagreed as to Dun & Bradstreet and its office manager. It acquitted the FHA personnel, other than Goodwin who was severed and, like Mrs. Kapraki, testified for the Government. In view of the disagreement and acquittals, we do not marshal the facts with respect to these defendants, although weeks and months of testimony was offered and received with respect to their alleged participation in the alleged conspiracy.

POINT I

It was error for the District Judge to refuse to disqualify himself on the basis of "bias and prejudice" against the defendants Harry Bernstein, Rose Bernstein and Eastern Service Corporation and the case in all its counts against these defendants-appellants should be reversed and remanded for a retrial before an impartial judge.

The defendants timely served an affidavit in accordance with 28 USC § 144 which provides as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

The affidavit alleged the judge's bias and prejudice and set forth the facts and reasons for the belief that such bias and prejudice existed (A333-A347). Certainly the defendants' affidavit of disqualification, particularly paragraph designated "14" thereof, was not only sufficient but controlling. Paragraph 14 read as follows:

> "It is respectfully submitted that the above noted extracts establish that:
>
> (a) Judge Travia has personally determined that those connected with Eastern Service Corporation, particularly the above named defendants, *are guilty of the*

> *crimes charged,* and (b) *based upon allegations not contained in any of the indictments, but derived from some speculation or information from outside the record, Judge Travia has formed the opinion that the crimes charged actually resulted in extraordinary monitary* (sic) *loss to the United States, as well as substantial, ruinous losses to individual homeowners.* Additionally, aside from using the pleading process for the purpose of ascertaining the guilt of the individual defendant before him, Judge Travia adopted the stance of a prosecutor and sought to perpetuate the testimony of the pleading defendant against those defendants, particularly the above named, who have chosen to stand trial." (A346) (italics ours)

Whenever a motion is made under 28 U.S.C. § 144 for the disqualification of a judge, the Court may, indeed *must,* pass upon the sufficiency of the affidavit, but may not pass upon the truth of the matters alleged. *Berger v. United States,* 255 U.S. 22 (1921); *Action Realty Co. v. Will,* 427 F. 2d 843, 844 (7th Cir. 1970); *United States v. Roca-Alvarez,* 451 F. 2d 843, 847-848 (5th Cir. 1971); *Rosen v. Sugarman,* 357 F. 2d 794, 797 (2d Cir. 1966); *Wolfson v. Palmieri,* 396 F. 2d 121, 124 (2d Cir. 1968). Accordingly, the question is not one of fact involving the judge's bias and prejudice, but one of law with respect to the sufficiency of the affidavit which charges such bias and prejudice.

In *Berger v. United States, supra,* the Supreme Court held that to be sufficient, an affidavit must show "the objectionable inclination or disposition of the judge", and it must give "fair support to the charge of a *bent of mind* that may prevent or impede impartiality of judgment" (255 U.S. at 33-35). (Italics ours.) The *Berger* case holds squarely that a district judge, when sought to be disqualified, may not pass upon the truth of the affidavit, but only on its sufficiency as a matter of law.

In *United States v. Roca-Alvarez*, 451 F. 2d 843 (1971), the Fifth Circuit said at 847-848:

> "Whenever a motion is made under 28 U.S.C.A. § 144 for the disqualification of a judge the court may pass upon the sufficiency of the affidavit but may not pass upon the truth of the matters alleged." (Citing *Berger* and kindred cases).

In *Rosen v. Sugarman*, 357 F. 2d 794, 797 (1966) this court said:

> "The principles governing the disposition of affidavits for disqualification under what is now 28 U.S.C. § 144 were laid down in Berger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 (1921). Although the facts stated in the affidavit are to be taken as true, the judge may inquire into their legal sufficiency."

In *United States v. Womack*, 454 F. 2d 1337 (5th Cir. 1972), it was held that a trial judge should have disqualified himself, citing certain comments which the judge had made concerning Womack in the course of proceedings against other defendants:

> "We now turn to the sufficiency of the affidavits. The law on this question is extensive but we need not belabor its breadth or nuances to decide this case, in which the allegations of the affidavits are clearly sufficient. During the Musgrave trial the judge referred to appellant as a man 'who everybody admits was certainly a shady character,' and told the jury: 'If you find that Musgrave did this there is no question but that Womack was working with him hand in glove . . . he would be as culpable.'" (454 F. 2d at 1341)

The remarks of Judge Travia during the pleading and sentencing proceedings involving others in related cases as well as co-defendants in this case months before the trial, were at least the equivalent of the comments above noted; indeed, they were much more aggravated and clearly revealed his "bent of mind"; see A15, A9, A10, A19, A329.

In *Action Realty Co. v. Will*, 427 F. 2d 843, 845 (7th Cir. 1970), the following was noted:

> "We would add to the foregoing salutary pronouncement that no doubt some judges, even though not biased or prejudiced, have denied motions for a new judge simply because of a feeling that to grant the motion could be construed to be an admission of the non-existent ground for disqualification.
>
> "This motivation, we feel, should never deter a judge from granting the motion if the over-all administration of justice, and the needs of the particular litigation, are improved thereby. This is the same basic policy which precludes the entering of a compromise and settlement as being considered an admission of liability."

In *Action Realty Co. v. Will, supra*, the Seventh Circuit further said:

> "There are some well-established controlling principles in the present type of proceeding as to which there is no discernible conflict of authority, at least at the federal level. *Thus, the factual allegations of the affidavit must be taken as true.* Further, the primary duty of the court is only to determine the legal sufficiency. If the factual allegations show the objectionable inclination or disposition of the judge, it is his duty to proceed no further." (italics ours)

Contrary to law the District Judge in our case proceeded to pass upon the truth of the matters alleged, rather than upon the sufficiency of the affidavit. In fact, there was no discussion of the sufficiency of the affidavit. At A440 the Court turned to Government counsel and said "I am asking you to defend me." Government counsel said, "Whether you are personally biased is something that only your own conscience can say" (A441)—thus, contrary to law, pitching the whole question on the truth of the affidavit. Government counsel continued in this vein and said that there was

no reason for the Judge to disqualify himself "unless *in fact* in his own conscience he has formed a personal bias under which circumstances he must disqualify himself" (A442). Government counsel didn't question the sufficiency of the affidavit. The Court then stated. "You can be sure that my answer to your last statement is absolutely no" (A442). The Court then stated to defendants' counsel, "Your application, I might say, amused me, to say the least." (A444)* The Judge then brandished what John P. MacKenzie, in his recent book entitled "The Appearance of Justice", aptly called the "velvet blackjack" and demanded to know if defendants' counsel made the motion to disqualify in the belief that the Judge was a "coward" and would therefore disqualify himself (A444). He continued in language more suited to some other time and place and announced that there was nothing in the defendants' papers that "would prompt me to *dump* this case" (A444).** He then denied defendants' application and said, "I intend to remain as the judge in this case." (A445). He sure did so intend, come what may, and no matter what the showing—therein lies the error.

In fact, he was so determined to keep the case that when courageous defense counsel were seeking to have the superseding indictment reduced to some manageable size, pointing out that to proceed as to 200 counts would require all parties to be in court until "doomsday", the Judge, unmoved and adamant, said "I have got a lifetime appointment" (B443-444).

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* evidencing a strange sense of humor on the part of a judge who could find "*amusement*" in a charge that he was disqualified to sit in judgment in an important criminal case.

** He seems to have been unfamiliar with the word "recuse".

The District Judge's hostility to the defense was revealed at every turn. When "3500 material" was requested the Court said "If it was up to me, I'd repeal it—that 3500 rule" (B470). When some Southern District cases were attempted to be cited in support of a defense position, the following occurred:

> "The Court: The mother court. They call that the 'mother' court. I don't want to tell you what kind of a mother—they wouldn't like my description." (B495)

On another occasion when one of defense counsel respectfully addressed the Court as "Your Honor", the Judge said "Your Honor, my eye." (3561, see also 16717)

When the defense offered an exhibit which in the sequence of numbering occasioned the request that the exhibit be marked with the letters "BS", the learned judge said "You are getting to the proper letters." (8517)—this in the presence of the jury. At another time when a computation was being made he said that "any jerk" would know the answer (12606).

The Court will note, as we have pointed out, that the rule of the cases is that the duty of a challenged judge is to concern himself with the sufficiency of the affidavit of prejudice and not to pass upon the truth of the matters alleged. The District Judge proceeded to do exactly that which is forbidden. As we have further pointed out, there was no discussion of the sufficiency of the affidavit, but instead, only a brusk statement of the Judge's resolution of the question of fact, of bias and prejudice, evidencing alternately a supercilious sense of humor or unbecoming and uncalled for indignation (A444-445). It is difficult to conceive of a statement more clearly sufficient to occasion dis-

qualification than the unequivocal statement in the affidavit that the Judge had personally determined the guilt of the defendants and that his bias and prejudice in this regard were derived from sources "outside the record", as well as the more serious charge that he had adopted the "stance of a prosecutor" (in advance of the trial) and had in effect participated in the development of the prosecution's case in the examination of other persons in this and related cases entering pleas months in advance of the trial. In this connection we pause to ask rhetorically what must one allege to bring about a disqualification, in addition to a charge that goes to the heart of the fairness of the operation of the judicial system under which he is to be tried.

The *sine qua non,* indeed the fundamental requisite, of a fair trial is an impartial tribunal of which the judge is an important part. In the case at bar the defendants Bernstein and Eastern Service Corporation sat for nine months before a judge who had stated long before the trial not only that he was sure of the fact of *"this conspiracy"** but sure of the fact that *"this conspiracy has cost society millions of dollars by way of payment of taxes and otherwise"* and that *one cannot close his eyes "to these things"* (A329). He further stated that the other conspirators were "sucked in by the Bernsteins" and, probably worst of all, that "Joe Blow, the guy on the street, is paying for the high living of many." (A280, A345)

Any claim that this information, or more accurately, misinformation, came to the Judge in the performance of his judicial functions is entirely without basis. Neither the Government nor the Judge can point to anything except

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* The one to be tried. He even characterized the alleged conspiracy as "this terrible scheme" (A192) and this was a "great big scheme" (A230).

newspaper publicity on the subject of the alleged cost to "Joe Blow" or to anyone else as a result of the claimed conspiracy. The District Judge was imbued with the notion that, as he said, Joe Blow is buying "a piece of junk" and "paying a lot more for what he shouldn't be paying for" and that he was "being milked for probably his life-time savings." (A190) The District Judge was repetitious in his statements (A343-A345). At this and other points in the record it is clear that the judge assumed the role of an avenger and a year later carried it out by sentencing a 65-year old woman to prison for four years and a 67-year old man, who had a heart condition that prevented his presence in court on occasions during the last months of the trial, to prison for five years. Not content, he then imposed cumulative and excessive fines totalling $685,000 on the Bernsteins and Mr. Bernstein's company. All this in a case so conceived, so structured and so tried that no defendant could effectively defend himself.

Obviously, and as the affidavit states, the basis of Judge Travia's bias and prejudice against the defendants did not arise from the record or even from the proceedings before him in the case. More than likely such bias and prejudice arose from the unfortunate and irresponsible press reports with respect to the proceedings of the Grand Jury and the return of the indictment. This appears from the fact that he kept talking about the alleged $200,000,000 cost to the Government or to the man on the street, sometimes referred to by the Judge as "Joe Blow." While we expect that the subject of prejudicial publicity will be discussed in depth by other counsel, for our purpose we quote from a transcript of a news report of WNEW-TV News, Channel 5, apropos of the return of the indictments in 1972, Exs. DU and DV, reading in part as follows:

> "Assistant U. S. Attorney, Anthony Accetta says there were 2500 homes in Brooklyn, in Queens that had FHA insured mortgages foreclosed in 1970 and '71, as a result of the scheme. 10 percent of those mortgages were financed by Eastern. Accetta expects just as many foreclosures this year and next, due to the alleged fraud. *He estimates it will cost $200,000,000 in insurance to pay the mortgage holders.*" (11883-4) (italics ours)

Evidently Judge Travia was influenced in his bias and prejudice against the defendants by the kind of rumor, gossip and newspaper publicity which later he was obliged to tell the jury to disregard. It seems to us incongruous to say the least to have a judge who said he could not close his own eyes to a conspiracy or "terrible scheme" which he said he was "sure" existed and was sure had cost the Government or the man on the street hundreds of millions of dollars, piously instructing the jurors at least twice every court day during the nine-months trial to keep their minds open and to listen to no source of information and not to read any newspapers on the subject of the trial or related matters and to keep their minds open until the case was finally submitted.

While the defendants were entitled by statute and under long established case law to have the District Judge recuse himself, we preface a more detailed discussion of the District Judge's obligation so to do with a quotation from the Code of Judicial Conduct as promulgated by the American Bar Association:

> "C. Disqualification.
>
> "(1) A judge should disqualify himself in a proceeding in which his impartiality might *reasonably be questioned*, including but not limited to instances where:

> "(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;". (Italics ours.)

The Standard recognizes the fact that in an age when images, televised or conjured by molders of public opinion and taste, often blend confusingly with reality, the appearance of justice has much to do with the reality of justice. As Justice Frankfurter said for the Supreme Court in 1954, "Justice must satisfy the appearance of justice."

No one can put it better than did this court in another case involving the same judge. In *Winters v. Travia,* 495 F. 2d 839, 842 (1974), this court said:

> "'Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it.'"

Certainly there should not be one rule for Winters and another one for the Bernsteins and Eastern Service Corporation.

In *People v. Savvides,* 1 N.Y. 2d 554, 556, the Court of Appeals of the State of New York said:

> "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach."

We compare the foregoing lofty statements with the undisputed facts in this case. On February 2, 1973, approximately nine months before the trial, the District Judge stated in open court,

> "*I am sure this conspiracy* has cost society millions of dollars by way of payment of taxes and otherwise, and

> the people who get involved in these houses were dealt with very sharply. *You cannot close your eyes to these things.*" (A329)*

Such an exaggerated statement has no support and is contrary to the fact.

On January 22, 1973, approximately ten months before the trial, one Donald Charles Carroll came on for sentencing before Judge Travia in another case. During the course of that proceeding Judge Travia stated:

> "The Court: That whole scheme has cost the government upwards of two or three hundred million dollars, and who's paying for that?
>
> "[The prosecutor]: The public.
>
> "The Court: Joe Blow, the guy on the street is paying for the ***high living of many.***" **(A280)**

This oft-repeated statement of Judge Travia revealed not only his bias and prejudice but something which was an obsession with him before, during and after the trial. There was no basis in fact for his talk about "high living". There was no evidence on the subject before, during or after the trial. The Bernsteins live in a heavily mortgaged and modest house. Both are physically impaired to the point where they could not indulge in high living if they could afford it. More importantly, there was no evidence at any time from any source that the alleged conspiracy cost the Government substantial sums of money.

On February 2, 1973, co-defendant Frank Fey came before Judge Travia for sentencing. During the course of that proceeding Judge Travia stated as follows:

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* This is the equivalent of saying that he couldn't overcome his prejudice.

> "You figure there were so many involved here, and all of whom played a key part, and if he was *sucked in by the Bernsteins,* he was smart enough to know he didn't have to be. He went along with it, whatever his motives were." (A321)

We are sure that the canon writers of the American Bar never dreamed that they would have to state specifically in black letter text that a judge who was "*sure*" of the existence of the conspiracy he was about to try and its disastrous effects upon the man in the street should disqualify himself from presiding at a trial involving the guilt or innocence of persons whom he said he was "*sure*" organized the conspiracy and "*sucked*" others into it. The ABA Code, and perhaps the Senate's vote with respect to the Haynesworth confirmation, are widely believed by the bench and bar to have repudiated the old "duty to sit" notion that some federal judges had theretofore assigned as a reason not to disqualify themselves. This case presents an excellent opportunity for the burial of the dead and unlamented "duty to sit" doctrine and its replacement with the "appearance of justice" standard by which judges stay out of doubtful cases. It beggars one's powers of imagination to conjure a case crying louder for a disqualification than our case, where the judge had announced that one could not close his eyes to the conspiracy which he was sure existed before he heard a word of testimony. Furthermore, whether we look to the statute, to the case law or the standard, we find overwhelming authority requiring the District Judge's disqualification.

The defendants tried to raise the point here under discussion by means of mandamus in advance of the trial. Their application was denied, not on the merits as we understand it but on the ground that the point was more appropriate for appellate review. In effect, the defendants

were told that their application was premature. Now we respectfully submit that they should not be told that the present application for reversal is too late. Especially is this so because the defendants were not to blame for the length of the trial and the amount of time consumed. Both were due wholly and solely to prosecutorial mismanagement. See discussion under succeeding points.

We have not discussed Section 455 of Title 28, United States Code, which became law on December 5, 1974, because it specifically provides that the Act shall not apply to the trial of any proceeding commenced prior to the date of the Act. Our case does not turn on the mere question of whether the District Judge's impartiality could reasonably be questioned. It should turn on the fact that the District Judge's bias and prejudice were established by an affidavit sufficient in form and substance to show that he was plainly disqualified on the basis of then existing law when months before the trial he was asked to withdraw.

We conclude our discussion under this point by stating our awareness of what may be a natural reluctance on the part of an appellate court to reverse and set at naught the results of a nine-months trial. If efficiency and the rationing of court time is the "be all and end all" of the administration of justice these days, then our task under this point is difficult, but if justice still soars higher for its object and the time-honored verities with respect to a fair trial before an impartial tribunal still exist, then we must prevail. We refuse to believe that this court will announce a doctrine that the fundamentals of a fair trial need not be respected if the trial is an inordinately long one and preempts much court time, especially when the time consumed is due to prosecutorial mismanagement. Without an invidious reference to any particular judge, not even the one

we seek to reverse, we observe that such a doctrine would make a judge who refuses to recuse himself in a proper case for disqualification secure in the thought that in no event would he be reversed if the case were to be a long one. When that time comes it can be surely said that the form has outlived the substance of the faith. All in all, it seems to us that the provisions of the statute and the rule of the cases should not be watered down one drop or changed one bit and thus be eroded by a disintegrating exception in the case of a long trial.

As Judge Herlands once said:

> "Despite the lengthening shadow of long criminal trials, we are sustained by the faith that judges will never be required to have an obsessive preoccupation with mere speed. Judicial excellence consists in not counting time but in making time count." (34 F.R.D. 167)

We believe that it will be manifest to this court from an examination of the record and briefs that a retrial of this case, especially the only counts that could survive, would not take more than ten or fifteen court days.

POINT II

The case as conceived, structured and tried deprived the defendants of a fair trial.

The impossibility of defending against the charges first appears from the face of the indictment, the bill of particulars and from the pretrial proceedings. (The pretrial proceedings are contained in the four printed books to which we have referred.) The nine-months trial which commenced in October 1973 and finished in June 1974 confirmed the fact of this impossibility. We believe that all

this will become manifest from our discussion under succeeding points. In such event the judgment appealed from should be reversed and the case remanded for retrial in a manageable way because the defendants have been deprived of their constitutional right to a fair trial. If the prosecutorial mismanagement is found not to have invaded the constitutional rights of the defendants, the court should nonetheless exercise its supervisory powers and reverse the judgments and remand for a retrial on such counts as would make for a proper disposition of this unprecedented case.

POINT III

The conviction of the defendant Eastern Service Corporation on counts 2, 4, 5, 7, 9, 10, 12, 14, 16, 17, 18, 20, 21, 23, 25, 27, 28, 31 and the defendant Harry Bernstein on count 25 should be reversed by reason of errors in the Court's Charge*.

The counts in question arise from false statements contained in various applications to the FHA for mortgage insurance. The evidence established the fact that Eastern Service Corporation and Mr. Bernstein, instead of making false statements in such applications for mortgage insurance, were the victims of false statements instigated by the dishonest real estate broker Ortrud Kapraki, who corrupted, through the medium of payments of money, lesser employees of Eastern Service Corporation.

Government counsel at one point stated, "Eastern Service Corporation had no full knowledge of any false statements" (15543, 18742). In its summation Government coun-

* These are the so-called false statement counts and throughout the trial were referred to as such by Court and counsel.

sel said, ". . . of all these defendants, the Government is only claiming that one of those defendants, that is, Melvin Cardona, had actual knowledge that the statement being submitted in the counts he is involved in were false." (20640-1).

With the strictures placed upon the length of this brief and its number of pages, we cannot pause to analyze the false statements in any detail. Sufficient for present purposes is it for us to state that the evidence justified the jury in finding many false statements on the part of Mrs. Kapraki and her customers (*e.g.* 3251, 3255, 3262). These false statements pertained to many details of the credit information furnished by customers of hers who were applicants (*e.g.* 3270, 3285). Indeed, Mrs. Kapraki's false statements and those of her customers extended to spurious financial statements and other fraudulent credit information placed on the forms accompanying or a part of the various applications for FHA mortgage insurance (2362, 2374-76). *It should be kept clearly in mind, however, that the false statements were not those of Eastern Service Corporation but those of Mrs. Kapraki and her customers made to Eastern Service Corporation as well as to the FHA.* The basic charge of the Government seems to be that Eastern Service Corporation relied at its peril on the certified statements submitted to Eastern Service Corporation by mortgagors and the credit reports supplied to Eastern Service Corporation by Dun & Bradstreet. The evidence shows that the only connection of Eastern Service Corporation with the false statements was the ministerial acts of processing them (checking them for completeness and transmitting them to the FHA). This was done by employees who "expedited" the processing and transmittal of the applications in return for money surreptitiously paid by Mrs. Kapraki (3099-3102, 3103-04).

The false statements alleged, not having been those of Eastern or Mr. Bernstein, but only those made by applicants to Eastern as an initial lender and passed along to the FHA for insurance purposes on forms provided by the FHA, threshhold questions arise as to what was the duty of Eastern and its management with respect to ascertaining the truth of the statements made in the applications. Was there a duty on the part of Eastern or Mr. Bernstein to investigate and determine the truth of the many statements in the applications? Could Eastern and its management be found guilty of crime on a theory of negligence? Could Eastern and its management be convicted for failure to investigate and ascertain the truth of the statements which are claimed to be false?* Did Eastern or its management have an affirmative duty as the court put it to "*insure*" that the statements were true (21426, C513). These are obviously questions of *law* and since the Court submitted them to the jury as questions of *fact,* convictions on these counts must be reversed. The only substantial question with respect to the false statement counts is whether the counts should be dismissed or remanded for retrial. On a basis of worst things first, we discuss the errors in the District Court's charge requiring reversal before arguing the proposition that these counts should be dismissed.

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* The mortgagee's certificate (Eastern's) which was prescribed by the FHA (see GX 146) and which accompanied the various applications transmitted to the FHA read merely,

> "The mortgagee certifies that all information in this application is true and complete to the best of his knowledge and belief." (21432, GX 146)

This certificate negatives the implications of liability for anything except a statement known to be false. If negligence, or even recklessness, was intended to be comprehended, there should have been included some statement to the effect that as a result of an investigation made by Eastern, the statements were found to be true. No investigation was required by any law or regulation.

Among the more egregious errors made by the District Court in its rambling, prolix and verbose charge consuming the many days hereinbefore referred to was the Court's charge on the subject of the so-called "false statement" counts. Not content with hopelessly confusing the jury with talk about reckless statements made by a defendant as to facts of which he might be ignorant (21425, C512),* in violation of the rule announced by this court in *United States v. Sarantos,* 455 F. 2d 877 (2d Cir. 1972) and kindred cases the Court, instead of informing the jury as to a defendant's duty, if any, to ascertain the truth of the statements made by others, in the context of the case, left it to the jury to say what a particular defendant's duty was in the circumstances. This was the plainest of error; see cases cited *infra.* In this connection, the Court went to the subject of the so-called "mortgagee's handbook" or guide, and the FHA manual, GXs. 145 and 147, received in evidence at 2219 and 2234, and instructed the jury,

> ". . . you may find that the *FHA program* places a duty on the mortgagee (Eastern and Harry Bernstein) to investigate and exercise *proper credit judgment* with respect to statements contained in applications for mortgage insurance submitted to the FHA" (21425-21426, C512-13).**

The Court then told the jury,

> ". . . if *you find* that there is such an affirmative duty, then the standard of recklessness, which I mentioned earlier, is applicable to the defendant Eastern Service Corporation, which is an approved mortgagee" (21426, C513).

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* The defendants made no statements.

** The Court made no explanation of what he meant by the "program." Possibly, or at least the jury could infer that he meant almost anything which the jury considered to have been developed durnig the nine-months trial. Among other things, the vice and far-reaching error of this instruction was the *equating* of poor "credit judgment" with false statements.

Perhaps worst of all, the Court then talked in terms of *insuring* the truth of statements:

> "Also, in this regard you may determine whether or not the evidence shows beyond a reasonable doubt that the defendants Harry Bernstein and Florence Behar occupied such a position. You may find that any person in such a position had an affirmative duty to *insure* that statements made in the application were true, and if you so find, then the standard of recklessness is also applicable to such a person." (21426, C513)

The Court did not instruct the jury as to how or on the basis of what finding an affirmative duty would arise, much less what such a duty was or where in law it would spring from.

The Court then went on to involve the individual defendants as well as Eastern Service Corporation in the event of such a "finding" on the part of the jury (21426, C513).

Without regard to any other factor in the confusing and erroneous instruction to the jury on this subject the most aggravated was the Court's reference to "*proper credit judgment.*" It was bad enough—error in itself—to let the jury determine the existence of defendant's duty but to suggest a new theory and introduce a new and undefined standard or possible requirement was the last straw.* Nowhere did the Court give any standard for determining good or bad credit judgment.

In discussing credit judgment, it should be kept in mind that the whole purpose of the National Housing Act is to provide homes for the poor and the indigent; indeed, to those who really have no credit standing (13570-13584).

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* One not even argued by the government.

Good credit judgment in the conventional sense of the term would undoubtedly defeat the object of the legislation.

Nowhere in the indictment and nowhere in the bill of particulars is there a mention of proper credit judgment or the lack of it. Nowhere in law or in any regulation having the effect of law is such a burden imposed upon a mortgagee or any of its officers or directors. Nowhere in law or in any regulation having the effect of law has it been provided that the lack of good credit judgment or good business judgment constitutes a crime and the basis for a conviction on an unending series of counts charging separate crimes each time a lay jury could find with the benefit of hindsight that the judgment used was, in the jury's opinion, not good.* Even a statute or an otherwise valid regulation couched in the language of the charge would be unconstitutionally vague and lacking in standards by which a defendant's guilt could be determined in a criminal case. *Smith v. Goguen,* 415 U.S. 566 (1974); *Giaccio v. Pennsylvania,* 382 U.S. 397 (1966); *United States v. Cohen Grocery,* 255 U.S. 81 (1921).

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* We observe in passing that it used to be that if a businessman was concerned with the question of whether or not he was committing a crime, he had but to consult his conscience for the answer. Time came when this would not suffice and he had to examine a statute and later "regulations" on the subject. Now it seems that with a host of bureaucrats dreaming up synthetic crimes, such a man must not only consult a lawyer specializing in the field with which he is concerned, but a lawyer who subscribes to all the relevant handbooks, guides, loose-leaf and other services, cumulative in character, suggesting conduct which a jury could capriciously translate into a crime if not followed. If we have now reached the point where bad "credit judgment" or the failure to exercise good credit judgment constitutes a crime, a new peril to those who have the hardihood to attempt to do business during the widening recession which we are experiencing has been introduced.

The proposition to be decided under this point is simple and readily determinable. Either a statute or a properly promulgated regulation having the effect of law placed an affirmative duty on the defendants to "insure" the truth of the credit information contained in the applications, or no such affirmative duty was thus imposed. Such a duty could not be imposed by some documents, however happily described as a "mortgagee's handbook" or an "FHA manual" (21386, C471) even if the alleged duty was mentioned in such a document or book which it was not. It certainly was the obligation of the Court to instruct the jury as to whether or not such an affirmative duty on the part of the defendant existed and the source of such duty. More importantly, the Court should have told the jury what the duty was. Under no theory could he properly submit this question of law to the jury as if it were a question of fact, but the Court did exactly this. The Court said:

> ". . . the Court took judicial notice of, and the mortgagee's handbook and the FHA manual, and *whatever other evidence there was,* if any, *in the case,* is for you to determine if the FHA, of the Housing and Urban Development, places an affirmative duty on certain of the defendants in this case."* (21386, C471)

It should be noted that the Court spoke of some affirmative duty "on certain of the defendants in this case." He didn't say which one or ones; the jury wouldn't know whether he meant the Bernsteins, Eastern or Dun & Bradstreet, together with the personnel of either or both companies. The Court's statement that it "took judicial notice of the mortgagee's handbook and the FHA manual and *whatever*

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* Compare this inarticulate and garbled statement with this court's twice announced statement of the requisites of a charge; see *United States v. Clark,* 475 F. 2d 240, 248 (2d Cir. 1973) and *United States v. Howard,* 506 F. 2d 1131, 1134 (2d Cir. 1974).

other evidence there was, if any, in the case" is startling, to say the least. Did the Court mean that all the Government's evidence was credible in the opinion of the Court? How could a lay jury know what was comprehended by this statement, or its significance? Compounding the error, the Court said:

> "You may in making such a determination consider the regulations that have been read to you during the course of the trial, the testimony of the witnesses concerning them, the instructions concerning the applications necessary to be filed, and the papers necessary to make up the complete application. You recall they referred to that as a package, if I recall correctly." (21386, C471).

The purpose of this uninformative instruction is not clear to us. All we can make of it is that the Court gave the jurors *carte blanche* to rummage through "packages" of papers aggregating over a million papers (20691) in the month of June 1974, most of which had been introduced in evidence in October 1973,* and then come up with their notion of the defendant's duty which they might find to have been so created in this unprecedented criminal case. We do not mean to be carping in our criticism of the Court's charge but, with all due respect, we think that the administration of justice as well as our clients were entitled to something better from a judge who had had approximately nine months** to analyze the evidence as it

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*We note that what the jury might think in October of 1973 constituted good credit judgment might be considered by the jurors to be something else in June 1974 when they took the mortgage application papers into the jury room. There had been a great change in the economy in the interval. Again we are talking about the poor, the helpless and those needing social welfare assistance of some kind (13570-13584). Who could say which among them was a good credit risk?

** The Court said he had been "working on the charge since the first day" (13768).

was received, clarify his thinking and organize his charge. As this Court said in *United States v. Clark*, 475 F. 2d 240, 248 (2d Cir. 1973) and again in *United States v. Howard*, 506 F. 2d 1131, 1134 (2d Cir. 1974):

> "If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt . . .."

The Court's charge on the subject under discussion lacked any of these attributes. See also 21387, C472 for more of the Court's charge on the same subject.

In the celebrated case of *United States v. Guterma*, 281 F. 2d 742, 751-2 (2d Cir. 1960), this Court passed on a situation markedly similar to that of the case at bar with respect to the effect of a federal agency's "instruction." Judge Friendly, speaking for a unanimous court, said:

> "After outlining most of this evidence the trial judge left it to the jury 'as the ultimate triers of the facts in this case, to determine what weight, if any, you wish to place on the computations of Mr. Locke and Mr. Doyle [the government's witnesses] on the one hand, and those of Mr. Acker [the defendants' witness] on the other,' and thereby determine 'whether or not the net book value of the assets pledged constitutes more or less than 15 percent of the total assets of Jacobs and its consolidated subsidiaries.' *In doing this the judge gave the jury a task properly his own, namely, the interpretation of the term 'net book value' in SEC Instruction 4* as applied to a pledge of securities. The conviction on Count 9 must therefore be reversed in any event; . . ." (Italics ours)

In our case the Court left to the jury the interpretation of the term "proper credit judgment" *which he equated with false statements* and the effect of a bureaucrat's book of

instructions, which was not even shown to have been brought to the defendants' attention and further the court left it to the jury to say whether Eastern or its management had a duty to "insure" the truth of statements made by others.

In *Hotch v. United States,* 212 F. 2d 280, 284 (9th Cir. 1954), the Ninth Circuit said:

> "If certain acts have not been made crimes by duly enacted law, the knowledge of their contemplated administrative proscription cannot subject the informed person to criminal prosecution. While ignorance of the law is no defense, it is conversely true that a law which has *not* been duly enacted is not a law, and therefore a person who does not comply with its provisions cannot be guilty of any crime."

In *Viereck v. United States,* 318 U.S. 236, 241 (1943), the United States Supreme Court said:

> "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress. (Citing numerous cases.)"

The Government can point to no statute and no regulation having the effect of law which placed an affirmative duty on the defendants with respect to ascertaining the truth of the statements made in the applications and certainly none placing an obligation on the part of the defendants to exercise "proper credit judgment." While the subject of the effect of the mortgagee's handbook and the FHA manual was not properly one of expert testimony, the Court allowed the Government's FHA witness (call him an expert if one will) to testify on the subject (14973). Interestingly, he testified as follows:

"Q. Now, is it your statement that that is an instruction or a regulation?

"A. That's an instruction. Everything in these books are instructions."* (14973)

and further,

"Q. Does it have any binding effect, in your judgment, on the mortgagee?

"A. No." (14974)

Despite the above testimony of the Government's "expert", a man long in the service of the FHA, that everything in the books, GX 145 and 147, were mere instructions and had no binding effect on the mortgagee, a lay jury was permitted to find that the contents of each were not only binding but "binding" in whatever unspecified implication the jury would impute to it.** Shamefully, the jury was allowed to convict and the judge was moved to sentence an elderly couple to prison on the basis of what the jury concluded the *"program"*, of which the books were claimed to be a part, imposed in the way of an affirmative duty to exercise "proper credit judgment" and *insure* the truth of the statements of others.

The Court's charge was not only erroneous and without basis in law or fact, but it was grossly misleading. From a reading of the charge one would get the impression that there was something in the law, or as the Court put it, in the FHA "program" or possibly in the manual, which purported to place the duty of exercising "mortgage credit" judgment on the mortgagee. Such was not the case. The manual

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* At no time did the Court explain or even refer to the difference between a regulation and an instruction. The Court used the terms interchangeably.

** Even so, there was nothing in the books, by whatever name known, or anywhere else, requiring Eastern to use good credit judgment or be convicted of a crime.

placed the duty of exercising mortgage credit judgment squarely on the FHA and not the mortgagee. The manual, GX 147, Part V, sections 19, 20, 21 and 22, outlines for the guidance of *FHA personnel* how they shall prepare for and exercise credit judgment. Section 19 is entitled "Mortgage Credit Analysis"; section 20 is entitled "Rating of Mortgage Patterns"; section 21 is entitled "Mortgage Credit Procedure" and section 22 is entitled "Mortgage Credit Data." There is not one word in the manual about an obligation of the mortgagee with respect to any of the matters and things comprehended by these sections. The FHA had an approved list of credit reporting agencies, of which the defendant Dun & Bradstreet was one. Dun & Bradstreet was the credit agency which furnished the information from which the FHA personnel, exercising credit judgment, should rely.* The jury disagreed as to guilt on the part of Dun & Bradstreet and thereafter the trial court granted a judgment of acquittal.

The pervasive character of the error with respect to the handling of Government's exhibits 145 and 147 was not limited to the erroneous charge on the subject of their significance and the use to which they could be put, but extends to the admission of the same in evidence. There was no proof that Mr. and Mrs. Bernstein or Eastern ever saw G-147. See testimony of the FHA witness that the manual (G-147) is given to mortgagees "if they would ask for it", but that "it is not as a matter of course given to mortgagees" (14974) and, further, that instead they get something called the "mortgagee's guide" (14974).

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* It was the credit reporting agency, employed and paid for its work, which made most of the credit checks on the applicants. The Court's charge reads as if the mortgagee were required to do that which the credit reporting agency was employed and paid to do.

Even Government counsel seemed to agree that the question of whether or not an affirmative duty existed on the part of the defendants with respect to the statements in the mortgage applications was a question of law (18932). After counsel for one of the defendants had said ". . . let me say that any affirmative duty to investigate, or whatever it is, is in our view a legal issue rather than one that should be phrased for the jury to decide" (18918), and other counsel had made statements to the same effect while discussing the Government's request to charge, Government counsel said, "Now if the defense would rather have the definitive statement one way or the other from the Court, then it would not be necessary to refer to that" (18932), and further, that "The Government is prepared to agree with defense counsel, since that is their wish, that the question of whether or not the affirmative duty exists does not have to be submitted to the jury. The Court can determine that and instruct the jury" (18944).

Furthermore, the Court itself seems to have been confused, or at least ambivalent, on the subject of an affirmative duty, let alone what the duty was or would be. At 18932 the following occurred:

> "Mr. Wall: The question of affirmative duty is obviously an affirmative legal duty, and it seems to me that the legal duty is to be determined solely by the Court and not by the jury.
>
> "The Court: *That is right.*"

This is wholly different from what the Court charged.

The defendants objected and took exception to those portions of the Court's charge which we are discussing, 21521-2, C609-10, 21538, C626, 21541, C628. Extensive colloquies took place, including a reading of the portions objected to,

but the Court persisted in its error. See record references, *supra*. The Court was clearly and unmistakably informed of the defendants' claim of gross error with respect to these portions of the Court's charge.*

Amazingly, after the foregoing objections to the Court's charge and the colloquies incident to them, the Court, just before the jury retired to deliberate after nine months, made a bad situation worse, indeed impossible, by charging in part as follows:

> "Now, I also was asked to clarify the charge that I gave you concerning the affirmative duty.
>
> "You will recall that I referred to affirmative duty as being *a question of fact for you to determine* if the FHA plays (sic) an affirmative duty on various defendants. I would like to clarify the nature of that duty which *you may or may not find exists.*
>
> "As to Eastern Service, Harry Bernstein and Florence Behar, the question is, one, was there a duty to investigate and *exercise proper credit judgment* with respect to statements contained in applications for mortgage insurance submitted to the FHA?" (21618, C709)

Prompt and proper exception to this further erroneous charge by the Court was taken by all of the defendants (21622-21623, C713-14). All that we have urged against the charge as originally given is applicable to this erroneous

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* Incidentally and in addition to everything else, 6 weeks or more before the Court charged, it was brought to his attention that the question of whether or not there was any affirmative duty imposed on the defendants was considered by defense counsel to be a question of law in the circumstances and context of the case and not one of fact. Counsel said that it was an "obligation that the Court is going to decide and not the jury" (17759) and, further, "the jury will not decide whether an obligation exists. It is not a civil case. You want to decide that, ultimately, and charge the jury." (17759)

attempt to "clarify the charge" on the subject of "affirmative duty". Indeed, it was more aggravated and, if possible more harmful because after days of instruction, confusing at best, impossible to understand at worst and clearly erroneous, it was the last thing that the jurors heard before they went out to deliberate.

As stated by the United States Supreme Court in *Bollenbach v. United States,* 326 U.S. 607, 613 (1946),

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

There was, and could be, no claim on the part of the Government that there was any direct evidence that Mr. Bernstein had knowledge of the false statements (18742). In fact, Government counsel stated:

> "Eastern Service Corporation had no full knowledge of any false statements." (15543)

In his summation Government counsel said,

> ". . . of all these defendants the Government is only claiming that one of those defendants, that is, Melvin Cardona, had actual knowledge that the statement being submitted in the counts he is involved in were false."* (20640-1)

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* Vicarious criminal liability on the part of Eastern Service Corporation cannot be predicated upon the acts of employees acting in their own interests and for their own benefit. *Standard Oil Company of Texas v. United States,* 307 F. 2d 120 (5th Cir. 1962). According to Mrs. Kapraki, Florence Behar was receiving from $50 to $500 per closing for her part in expediting the processing of applications. Patricia Buckley was receiving $50 a closing for her part in the processing. Mickey Terry received $50 for promptly scheduling the closings. Melvin Cardona was receiving money for his part. All of these people were minor employees in a corporation in which Mr. Bernstein, who was president, owned all the stock. The corporation processed thousands of mortgage applications each year and serviced additional thousands of mortgages. Certainly Mr. Bernstein would not be a party to a conspiracy which involved bribing his own employees for the benefit of someone else.

and further

> ". . . the defendants, each of them, acted with a reckless disregard of whether statements that were made were true and acted with a conscious purpose of avoiding to learn the truth." (20462)

It is not possible to tell what standard the jury found to be applicable, nor is it possible to tell on the basis of what finding the jurors determined the guilt of Mr. Bernstein or Eastern Service Corporation. As we have demonstrated, the jury was erroneously instructed that the jurors could determine the standard by which Mr. Bernstein and Eastern Service Corporation were to be judged and then be convicted if they found such undelineated standard was not met.

The language of this court in the concluding paragraph of its opinion in *United States v. Clark*, 475 F. 2d 240, 251 (2d Cir. 1973) is particularly applicable to our case,

> "We are compelled to conclude in the present case that the guidance given the jury did not approach that standard required to enable it to fulfill its function properly, and that consequently a new trial must be had."

The errors in the Court's charge requiring a reversal of the substantive false statement counts also require a reversal of the conspiracy count. The Court's charge, as we have developed, permitted the jury to find guilt on the substantive counts by Eastern Service Corporation and in the one instance (Count Twenty-five) on the part of Mr. Bernstein on a theory of negligence or failure to exercise proper credit judgment or ascertain the falsity of the statements or on whatever other basis the jury could dream up.

A defendant cannot become a member of the conspiracy by negligence, but only by an affirmative agreement to join

others in a criminal venture with the hope that the venture succeeds. *United States v. Crimmins*, 123 F. 2d 271 (2d Cir. 1941)

The agreement of a conspirator as he understands it defines his liability.

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it . . ." *United States v. Peoni*, 100 F. 2d 401, 403 (2d Cir. 1938).

POINT IV

The false statement counts should be dismissed because the indictment does not charge a crime.

(a) The Indictment Contains no Allegations Identifying the Statements Alleged to Be False.

As we developed in our next preceding point, Eastern was charged in the redacted indictment with 18 substantive violations of 18 U.S.C. § 1010* and Mr. Bernstein with one.** The form of the count is identical in each instance, differing only in the date on which it is alleged that the offense was committed and the location of the property. As an example, count four of the redacted indictment in its entirety reads as follows:

> "On or about the 4th day of December 1968, within the Eastern District of New York, the defendants ROSE BERNSTEIN, also known as Rose Shorenstein, HARRY BERNSTEIN, FLORENCE BEHAR, PATRICIA BUCKLEY, ORTRUD KAPRAKI, MELVIN CARDONA and EASTERN SERVICE CORPORATION, for the purpose of influencing the Federal Housing Administration of the Department of Housing and Urban Development to insure a loan and

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* counts 2, 4, 5, 7, 9, 10, 12, 14, 16, 17, 18, 20, 21, 23, 25, 27, 28, 31

** count 25

advance of credit by the defendant EASTERN SERVICE CORPORATION, did knowingly make, pass, utter and publish false statements in an application for mortgage insurance on property located at 347 57th Street, Brooklyn, New York. (Title 18, United States Code, § 1010 and § 2.)"

The operative language in each count reads simply that Eastern* and Mr. Bernstein** ". . . did knowingly make, pass, utter and publish false statements in an application for mortgage insurance . . ." None of these substantive counts specifies the statements alleged to be false. None of the substantive counts alleges that the offense was committed wilfully.

It is fundamental that the indictment must charge a crime on its face without reference to any other documents. These requirements of specificity and particularity which an indictment must possess have long been established. *United States v. Mills*, 32 U.S. (7 Pet.) 138, 142 (1883); *Russell v. United States*, 369 U.S. 749, 763 (1962). These criteria arise directly from the Fifth Amendment guarantee of indictment by Grand Jury and the Sixth Amendment guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . ." They are embodied in the statutory requirement of Rule 7(c), Fed. R. Crim. P. that: "The indictment . . . shall be a plain, concise and definite written statement of the *essential facts* constituting the offense charged."

The Fifth Amendment states that "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury." Thus, only the grand jury (and not the prosecutor) has the power to charge a felony.

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* counts 2, 4, 5, 7, 9, 10, 12, 14, 16, 17, 18, 20, 21, 23, 25, 27, 28, 31

** count 25

The assurance that this constitutional requirement has been met can be provided only by an indictment that, on its face and unaided by any allegations in a bill of particulars, charges a particular crime. The indictment represents the charge found by the grand jury and that charge may not be amended or varied by the prosecutor. *Stirone v. United States,* 361 U.S. 212 (1960). As the Supreme Court has said in *Russell v. United States, supra:*

> "To allow the prosecutor, or the court to make a subsequent guess as to what was in the minds of the grand jury at the time they rendered the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." 369 U.S. at 770

Both of these constitutional guarantees as elaborated in court decisions seek to prevent the possibility that an indictment could be "open-ended" so as to allow the prosecutor subsequently to pick and choose what he (rather than the grand jury) believes should constitute the charge against the defendant.

The failure of the false statement counts of the indictment to specify or at least identify the statements claimed to be false is fatal to these counts. The consequences of such failure to specify or identify permitted the United States attorney for the purposes of the trial to assign as a false statement comprehended by the respective counts any one or more of the many statements contained in the documents cited in the counts. There was and there is no way in which any one could say that the statement considered false by the trial jury was in any instance the statement which the Grand Jury had in mind in returning the indictment.

Illustrative of the point we are making is the Government's desired and allowed reservations with respect to its bill of particulars on the subject of false statements. The Government consented to specify the "statements which the Government is *now* aware of, and will rely upon, as being false, with reservation of the right to offer evidence of *additional false statements* at trial" (B 518). If the Government had the right to offer additional false statements discovered between September 15, 1972 and the trial which commenced on October 15, 1973 it is clear that the grand jury could not have had such false statements as the basis for its accusations in May 1972 when it returned the superseding indictment.

Furthermore, in this case it is not possible to determine which of the hundreds, nay thousands, of factual statements in the aggregate made in the various documents referred to in the counts at least 12 members of the grand jury agreed should be the basis of the charges made in the various counts.

Still another effect follows from the defective indictment, which necessitates dismissal. Not only could (unconstitutional) variance of the trial jury's findings from the grand jury's findings occur, but there is no way the court can be sure it did not occur. Because the indictment does not identify any of the statements alleged by the grand jury to be false, but only states that some unidentified false statements appeared in reports, the record of whatever the grand jury found to be false has been forever lost. As we have pointed out it is in fact now impossible to determine which of such statements was alleged by the grand jury to be false.

The difficulty which the Government itself had in identifying the specific statements purportedly charged by the grand jury to be false is evidenced by the Government's tardiness in preparing the bill of particulars. The superseding indictment was returned on May 22, 1972. The Court's ruling on the request for a bill of particulars is dated October 20, 1972. On September 15, 1972 the Court instructed the Government to begin work on its bill of particulars "immediately" and the bill was to be delivered to the defendants in indictment 72 Crim. 587, the case at bar, within four to eight weeks.

The Court's order of October 22, 1972 required the Government to specify:

> ". . . what is false in the mortgage applications, limited, however (as conditioned by the Government in its consent) to the falsity of which the Government is presently aware and with the Government's reservation to offer evidence of additional false statements at trial." (B 518, B 384, B 666)

One would ordinarily have expected that it would not have required a herculean effort to specify the precise statements in each of the documents members of the grand jury agreed were made by the defendants knowing them to be false. This should have been readily known to the prosecutor. It should also have been apparent to the grand jury since at the time of voting the indictment they must have, or at least most certainly should have, focused on the specific false statements which were the basis of the counts in the indictment. This is particularly true in this case, since the grand jury was required to vote twice on the same basic allegations; once at the time of the original indictment (March 1972), and again at the time of the superseding indictment (May 1972).

Yet, no bill of particulars was served until March 23, 1973, almost twelve months after the filing of the original indictment and only after the defendants moved to dismiss the indictment for failure to comply with the Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases.

In justifying the delay at that time, the Government relied upon the difficulty it had in preparing the bill of particulars, particularly the voluminous grand jury testimony which had to be analyzed (A525) (Gov't Aff. March 28, 1973, A392). If the prosecutor himself had such difficulty in ascertaining the precise statements which supposedly formed the basis of the substantive counts of the indictment, can it fairly be said that the grand jury properly found specific statements to be false as the basis of the substantive counts? Where, as here, the indictment itself did not identify the statements, it is impossible to tell.

We have been unable to find any reported case which has sustained against challenge an indictment charging false statements which has not contained a specification of the statements alleged to be false. At the same time, the authorities requiring such specification are abundant. See, *e.g.*, *United States v. Borland*, 309 F. Supp. 280, 287-89 (D. Del. 1970); *United States v. Devine's Milk Laboratories*, 179 F. Supp. 799 (D. Mass. 1960). The counts of the present indictment utterly fail to meet the standards of specificity enumerated in *United States v. Tremont*, 429 F. 2d 1166, 1167, fn. 1 (1st Cir. 1970), *cert. denied*, 400 U.S. 831 (1970) and *Gevinson v. United States*, 358 F. 2d 761, 763 fn. 3 (5th Cir. 1966), *cert. denied*, 385 U.S. 823 (1966).

Perjury is a crime analogous to the preparation and submission of false statements proscribed by 18 U.S.C. § 1010,

and cases on Rule 7(c) requirements in perjury indictments establish that the count alleging perjury must set forth the false testimony. See, *e.g.: Sharron v. United States,* 11 F. 2d 689 (2d Cir. 1926); *United States v. Otto,* 54 F. 2d 277, 278 (2d Cir. 1931) ("an allegation of the testimony given, accompanied by an allegation that it was false, is sufficient . . ."); *United States v. Hiss,* 185 F. 2d 822 (2d Cir. 1950), *cert. denied,* 340 U.S. 948 (1951); *United States v. Goldenberg,* 276 F. Supp. 898, 900 (S.D.N.Y. 1967).

Very much in point is *United States v. Simplot,* 192 F. Supp. 734 (D. Utah 1961), *cited with approval in Russell v. United States,* 369 U.S. 749, 766 fn. 13 (1962), a case involving a perjury charge, where the court stated that:

> ". . . an indictment for perjury substantially in the terms of the statute without specification to some extent of the testimony claimed to have been false does not contain a plain, concise, and definite statement of the offense charged as required by [Rule 7(c)] the Federal Rules of Criminal Procedure, and does not, acceptably to the Constitution, inform the defendant of the nature and cause of the accusation against him." 192 F. Supp. at 737.

Indeed, the substantive counts charged are not in accord with the forms and guidelines of the Department of Justice for charging violations of 18 U.S.C. § 1010 and other false statement offenses. In its handbook, *Guides for Drafting Indictments,* the Criminal Division of the Department of Justice sets forth form indictments charging false statements under various statutes, all of which identify the statements alleged to be false. Attached hereto as an Addendum A are Form Indictments under 18 U.S.C. § 1010 (the substantive provision charged) and under related statutes, 18 U.S.C. §§ 1001 (second clause), 1001 (third clause),

1012 and 1014. The substantive counts charged in the indictment are therefore not in conformity with the Department of Justice's own standards for indictments of this type. The case authorities fully support this position of the Department of Justice, that an indictment alleging the submission of false statements must set forth with particularity the statements alleged to be false. *United States v. Leach*, 427 F. 2d 1107 (1st Cir. 1970), *cert. denied*, 400 U.S. 829 (1970); *United States v. Tremont*, 429 F. 2d 1166 (1st Cir. 1970) *cert. denied*, 400 U. S. 831 (1970).

Appropriate motions raising the points we are making were made before and during the trial. The sufficiency of the indictment was challenged by motion before trial and motions were made to dismiss at the commencement of the trial (1949-1959, 1976-1991); at the close of the Government's case (15470-73, 15482-87, 15505-15542), and renewed at the end of the entire case (18737-18741, 18747-18750, 18752-18753). Of course, the defects in the indictment which we have pointed out could not be supplied by a bill of particulars. Nevertheless, a reading of the 220-page bill of particulars (B 662-881) illustrates the points we are making and evidences the impossible situation with which trial counsel were confronted.

Recurring briefly to our Point III with respect to the false statement counts, a reading of the original indictment, the superseding indictment, the so-called redacted indictment and the bill of particulars involving in the aggregate hundreds of pages which nowhere mention anything called "proper credit judgment" makes clearer than ever the pervasive character of the Court's error, especially the charge with respect to the false statement counts.

(b) The so-called false statement counts of the indictment under discussion failed to allege that Eastern or Mr. Bernstein submitted false statements, knowing them to be false.

18 U.S.C. § 1010 makes it a crime to make, pass, utter or publish a false statement "knowing the same to be false". The false statement counts against Eastern or Mr. Bernstein do not charge the essential element of knowledge that the statements were false, but allege, in each instance, merely that Eastern and/or Mr. Bernstein knowingly made, passed, uttered and published statements (which the Government alleges to have been false, but not false to the knowledge of such defendants). Accordingly, the indictment counts failed to allege violation of § 1010 and should be dismissed.

In *United States v. Berlin*, 472 F. 2d 1002 (2d Cir. 1973), this Court recently reversed convictions of § 1010 and directed dismissal of counts under § 1010 for failure of the indictment to allege that the defendant knew of the falsity of the statements he submitted. This Court stated:

> "Appellant's third contention, that all counts of the indictment were deficient and failed to state a crime, is more troubling. At the close of the government's case, appellant moved to dismiss the indictment. Counts One and Two concerned violations of 18 U.S.C. § 1010 and Counts Three and Four concerned violations of 18 U.S.C. § 1014. An essential element of a violation of either statutory provision is that the offender had knowledge of the falsity of the statement that was made."
>
> • • •
>
> "The government argues that, since the counts charged that Berlin 'counseled and caused' Oswald to submit the false statements, the term 'counsel' implies knowledge of the falsity of the statements. With this argument we cannot agree. One can counsel and cause

> another to utter a statement that one only later learns to be untrue."
>
> 472 F. 2d at 1006-7, citing 1 *Wright*, Federal Practice and Procedure (Criminal) § 125, pp. 242-44.

Concerning any contention the Government may make that it was sufficient for the counts in question to cite the statute, the Court further observed:

> "This deficiency was not cured by the fact that each count cited the statute that appellant is alleged to have violated. Although the statutes in question explicitly require knowledge of the falsity, if this were enough to cure a deficient statement, then almost no indictment would be vulnerable to attack; for it is a common practice in indictments to cite the statute that is alleged to have been violated. We have been cited to no authority indicating that an indictment can be cured in such a fashion. Indeed, the cases, while not discussing the point explicitly, seem to imply that an indictment that fails to allege all the elements of the offense required by the statute will not be saved by simply citing the statutory section. [Citations.]" 472 F. 2d at 1008.

Accordingly, because these counts against Eastern and Mr. Bernstein fail to allege all of the elements of a violation of § 1010, they should be dismissed.

Each of these counts charges a violation of 18 U.S.C. § 1010, which defines as criminal the making, passing, uttering and publishing of any statement, knowing the same to be false, with the specific purpose of influencing in any way the action of the Department of Housing and Urban Development.* Essentially, the statute alleged to have been

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* The Government has nowhere alleged that omission of statements from any reports constituted violations of § 1010, so that it appears unnecessary to address this point other than to advert to *United States v. Adcock*, 447 F. 2d 1337 (2d Cir. 1971), *cert. denied*, 404 U.S. 939 (1971), in which this Court held that an omission is not a statement within the meaning of 18 U.S.C. § 1001.

violated prohibits the making of false statements to a particular federal agency, similar to other statutes also contained in Chapter 47 of Title 18 such as 18 U.S.C. § 1001. To prevent this from occurring, the statutes have required by their terms or have been interpreted to include, at a minimum, knowledge of the falsity and in most instances a specific intent, as that in 18 U.S.C. § 1010.

Accordingly, the crimes sought to be charged in these counts are specific intent felonies which require proof not only that the statement was factually inaccurate, but also that the statement was knowingly false to the maker and made with the specific intent of influencing the Federal Housing Administration. Only by application of the requirements of knowledge and specific intent to wrongly influence can the statute constitutionally prohibit and punish a false statement. *Morissette v. United States,* 342 U.S. 246 (1952).

POINT V

Counts 39, 41, 42, 44, 46, 48, 50, 51, 53, 55, 57, 59, 61, 63, and 65 should have been dismissed as to the defendant Eastern Service Corporation for lack of proof.

Without regard to the guilt or innocence of any other defendant on any count in the indictment and without regard to the guilt or innocence of the defendant Eastern Service Corporation with respect to any other count, it is crystal clear that the above enumerated counts should have been dismissed with respect to Eastern Service Corporation at the close of the prosecution's case, certainly at the close of the entire case.* Under these counts Eastern Service Cor-

* Proper motions to dismiss were made (15505-15542, 18752-18754).

poration is not charged as an aider or abettor but as a principal.* Both under the law of the case and under the law of the land Eastern Service Corporation, whose guilt could only be vicarious, could not be convicted unless the alleged bribes were paid for the benefit of Eastern Service Corporation or in its behalf. In its charge the Court instructed the jury as follows:

> "I charge you that a corporation which can only act through its agents and employees, is responsible for the acts of such agents and employees who violate the criminal law if such acts are done within the scope of employment and *with intent to benefit the corporation or further the corporate business.*
>
> "In order to find a corporation guilty of a crime, you must find beyond a reasonable doubt that, one, an agent or employee of the corporation has committed an act in violation of the criminal law.
>
> "Two, the agent or employee was acting within the scope of employment.
>
> "And three, the agent or employee acted with an *intent to benefit the corporation or further the corporate business.*" (21286-21287, C370-71)

This is not a case where we are talking about the authority of an officer to involve a corporation in a criminal act or are we attempting to define the scope of an employee's duties in that regard. We frankly state that Mr. Bernstein was not only the president of Eastern Service Corporation but through an intermediate holding corporation he was the beneficial owner of all of its issued and outstanding stock and if it could be found that he paid bribes "with intent to benefit" Eastern Service Corporation or "further th corporate business" of Eastern Service Cor-

* There was no proof that Eastern Service Corporation acted in either role.

poration, the corporation could be found guilty, but such was not the fact or even claimed to be the fact. Mr. Bernstein had *two separate businesses,* (1) he owned and with the help of 140 or more employees operated Eastern Service Corporation; (2) he invested (speculated, if one pleases) on his own account in real estate and mortgages. His personal real estate transactions had nothing to do with Eastern Service Corporation. It is with respect to his personal and separate real estate transactions carried out for his own account and not for Eastern Service Corporation that it is claimed the alleged bribes discussed under this point were paid.

The trial Court's charge that the jury could find Eastern Service Corporation guilty only if the bribes were paid with an "intent to benefit the corporation or further the corporate business" was a correct statement of the law. In *Standard Oil Company of Texas v. United States,* 307 F. 2d 120, 128 (1962), the Fifth Circuit said:

> "But while benefit is not essential in terms of result, *the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation.* For it is an elementary principle of agency that 'an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.' Restatement of the Law of Agency (2d) § 235." (Italics ours.)

Each of the counts here under consideration involves a charge that Harry Bernstein paid bribes to the FHA appraiser Edward Goodwin to influence his official action with respect to specific properties mentioned and described in the respective counts, all being properties in which Mr. Bernstein had an interest, and not to benefit Eastern Service Corporation. Important, and determinative, is the

Government's admission, indeed contention, made in its summation:

> "Harry Bernstein is not paying Goodwin bribes on all of the houses that Goodwin appraises for Eastern Service, but *only* on those houses where Harry Bernstein has some financial interest." (20375-20376)
>
> • • •
>
> "Here again Harry (Bernstein) is counting *only* those properties on which he has an interest, he's not paying Goodwin for every property on that list because Goodwin presumably is appraising other houses which are being processed under Eastern Service's eagle." (20376-20377)
>
> • • •
>
> "Not for the 2000 or 3000 or 4000 cases that Eastern processed during the year, but *for those special cases where Harry Bernstein had an interest* . . ." (20459-20460)

We believe that a reading of Government counsel's summation with respect to the alleged bribes at pages 20375 through 20460 will convince the Court that each and every one of such alleged bribes, if made,* was made for the benefit of Harry Bernstein and in no instance for the benefit of Eastern Service Corporation, and that said counts should have been dismissed.

We marshal the evidence to show that even if the amoral Goodwin could be believed, there was no evidence to show that he was paid bribes for the use or benefit of Eastern Service Corporation or that Eastern Service Corporation was in any way involved in the payment of such bribes, let alone as a principal.

It is undisputed that Harry Bernstein was personally interested in various pieces of property, either as the owner

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* We contend that they were not made.

of the fee through a corporation wholly owned by him known as Jet Warehouse, Inc. (15374) or as a mortgagee and on occasions he was interested as a second mortgagee. It is with respect to such properties that it is claimed by the Government that Mr. Bernstein bribed Goodwin.

The genesis of the alleged bribes is claimed to be found in a conversation testified to by Goodwin as having taken place on March 10, 1967 at Mr. Bernstein's office (11960-11970). Goodwin testified that on this occasion, Mr. Bernstein stated,

> "Now, from time to time you're going to be getting *my* cases. These are houses that I am interested in . . . Any case that you do have of *mine* . . . there's fifty in it for you." (11965)

Goodwin further testified that a month or so later he had a further conversation with Mr. Bernstein during which conversation Mr. Bernstein mentioned specific properties in which he was interested which Goodwin had appraised (12050) and arranged with Goodwin that when Goodwin's appraisal related to a property in which Mr. Bernstein had an interest, the application would be marked "ORE" and that these letters stood for "Our Real Estate" (12051).*

To facilitate Goodwin's access to those properties in which Mr. Bernstein had an interest, Mr. Bernstein delivered to Goodwin a master key which would open the doors of those properties in which he was interested (11969). This was obviously another means of separating out Mr. Bernstein's properties from those that were merely being serviced for others by Eastern Service Corporation. In the nature of things he would not have a master key to houses owned by others.

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* This was to distinguish Mr. Bernstein's properties from the thousands being serviced by Eastern Service Corporation.

A reading of Goodwin's testimony with respect to the alleged bribes here under consideration (the only evidence on the subject) confirms the fact that whenever he claims that money was paid, it was for specific houses in which Mr. Bernstein (not Eastern Service Corporation) had a personal interest. See, for example, Goodwin's version of his alleged conversation with Mr. Bernstein on November 10, 1967 (12545 *et seq.*). Goodwin testified that as he "went over" the various properties which he had appraised, Mr. Bernstein would say from time to time "That's one", meaning one of Mr. Bernstein's properties (12547). As another example see Goodwin's testimony at 12652 *et seq.* where Goodwin said that as he went over various of the properties with Mr. Bernstein on another occasion Mr. Bernstein "told me that that is one of his, that it is a Jet".* At this point in the record Goodwin told how he "wrote the word 'Jet' and a double check mark on the outside of the folder." Goodwin said that the word Jet meant that it was a house that "Harry Bernstein said he would be interested in, and it was a property that he was going to pay me on and he needed top dollar" (12653).

While Goodwin was testifying, he had before him the FHA files pertaining to each of the properties as to which he claims to have been bribed by Mr. Bernstein. An effort to marshal his testimony in detail as to each of these separate pieces of property would extend this brief beyond all permissible limits. Accordingly, upon careful consideration we believe that the best way to present the proof that each of the alleged bribes which we are discussing under this point pertained to a property of Mr. Bernstein and not Eastern Service Corporation is to list the count, the property involved and the record references to the proof

* meaning owned by Mr. Bernstein's company, Jet Warehouse, Inc.

that the property in each instance was that of Mr. Bernstein and not Eastern Service Corporation.

Count	*Property*	*Transcript Reference*
Thirty-nine	190 Adelphi Street Brooklyn, New York	12144—12170 ("mine"—12147)
Forty-one	185 Sackman Street Brooklyn, New York	12170—12193 ("mine" "Jet"—12171)
Forty-two	356 Van Siclen Avenue Brooklyn, New York	12194, 12201—12213 ("ORE" "mine"—12203)
Forty-four	312 Milford Street Brooklyn, New York	12230—12242 ("ORE mine"—12233)
Forty-six	340 Van Siclen Avenue Brooklyn, New York	12243, 12253—12268 ("mine"—12254)
Forty-eight	616 Schenck Brooklyn, New York	12361—12385 ("mine"—12362, 12451)
Fifty	468 Miller Avenue Brooklyn, New York	12387—12403, 12744 ("mine"—12390, 12451)
Fifty-one	381 Douglas Street Brooklyn, New York	12478—12485, 12508 ("one of his"—12479)
Fifty-three	726 Snediker Avenue Brooklyn, New York	12458—12477, 12509 ("mine"—12461)
Fifty-five	328 First Street Brooklyn, New York	12531—12537 ("thats one"—12546-47)
Fifty-seven	452 Miller Avenue Brooklyn, New York	12638—12649 ("one of mine"—12639)
Fifty-nine	454 Miller Avenue Brooklyn, New York	12626—12638 ("one of his"—12628)
Sixty-one	617 Vermont Street Brooklyn, New York	12698—12701 ("one of mine" "Jet"—12699)
Sixty-three	17 Wyona Street Brooklyn, New York	12818—12826 ("One of Harry's" "Jet"—12818, "mine"—12825)
Sixty-five	1034 Blake Avenue Brooklyn, New York	12994—13002 ("ORE"—12995)

Thus, it is clear from the Government's admissions, the Government's contentions, and more importantly from the prosecution's evidence that Eastern Service Corporation paid no bribes, participated in the payment of none of the bribes in any way, shape or manner, and could receive no benefit from the payment of any of these alleged bribes. Mr. Bernstein's interest and activities as an investor in real estate or as a speculator in mortgages as such was a business of his own, separate and apart from the business of Eastern Service Corporation. The Government prosecutors in their zeal, in order to whoop up the case and to multiply the fines in the event of success, overindicted with respect to the entire case and particularly where Eastern Service Corporation was concerned.

Several simple analogies illustrative of our point come readily to mind. For example, assume that A owned all the stock of an investment banking corporation and also speculated in securities for his own account. Assume, further, that in the course of selling his own securities he violated some provision of the Securities Act. The mere fact that he owned an investment banking corporation as a separate business would not subject such corporation to criminal penalties. Or, take the case of a man who owns all the stock of a corporate automobile agency who commits a fraud while selling his own personal automobile in which his corporation has no interest. Certainly such an act would not subject his corporation to criminal prosecution. The unworthy attempt of the prosecutors to make a whipping boy out of Eastern Service Corporation appears at every turn, even when the company was the obvious victim of Mrs. Kapraki's machinations, as appears from our Point III *supra*.

The conviction of Eastern Service Corporation under the counts here under discussion should be reversed and the counts dismissed.

POINT VI

The conspiracy count should be reversed and dismissed as to all defendants.

We are aware that one logical and perhaps the conventional approach to an appellate brief, even in this unwieldly and unmanageable case, might suggest that we discuss the conspiracy count first,* but it has seemed to us that a development of the facts involved in the substantive counts, each of which is assigned as an overt act,** demonstrates that the conspiracy count cannot stand. Therefore, we have discussed certain of the substantive counts before taking up the conspiracy charge.

Accepting, *arguendo,* all the Government's evidence to be true and viewing the case in a light most favorable to the Government, all that can be claimed from it is that of an arbitrarily selected group of several people,*** each person in the group, motivated by his or her own separate self-interest, preyed upon the FHA one way or another for his or her own benefit—certainly not for the benefit of Eastern Service Corporation.

The mere fact that several people at or about the same time may have been committing wrongs involving the FHA does not make them conspirators. As was said by this court in *United States v. Lekacos,* 151 F 2d 170, 173 (2nd Cir. 1945) quoted with approval *sub nom. Kotteakos v. United States,* 328 U.S. 750, 755 (1946), even "Thieves who dispose of their loot to a single receiver—a single 'fence'—

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* because it is designated Count One.

** Indeed, the crimes charged in the substantive counts are the only overt acts charged in the conspiracy count.

*** originally twenty three, reduced for the purpose of the trial to nine.

do not by that fact alone become confederates. . ." The indictment in the *Kotteakos* case charged numerous defendants with a single, comprehensive conspiracy to obtain loans under the National Housing Act upon false and fraudulent applications. The evidence showed that the applications for the loans were made separately with no connection with each other, although they were negotiated by the same person who, acting as broker, was the central person in the conspiracy. In that case, as in the case at bar. the evidence if true, revealed more than one conspiracy and the United States Supreme Court reversed the conviction. The court announced the right of each defendant "not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others." (328 U.S. 775)

The Government's evidence in the case at bar, if accepted, establishes that one of the separate schemes was organized by the real estate broker Ortrud Kapraki (20715). She claims to have entered into an agreement with the defendant Florence Behar, an employee of Eastern Service Corporation, to pay her money to expedite the processing of applications for mortgage insurance to the FHA (3099-3102). She claims further to have schemed with Melvin Cardona, another employee of Eastern Service Corporation, to pay him money for his assistance in obtaining false statements (5438). She also claims to have paid other minor employees of Eastern Service Corporation for assistance in processing applications (3103-04), and through Cardona, some outside accountants to prepare and furnish some spurious financial statements (*e.g.* 3642, 3674, 3770, 7546-7598). Mrs. Kapraki's motive is clear. She wanted to advance her own interest as a real estate broker or speculator. She wanted to make money on the sale of houses she owned or had options to purchase. If Mrs. Kapraki could be said to be telling the truth, Florence Behar

was motiviated by money paid to her by Mrs. Kapraki and Melvin Cardona was similarly motivated. In fact, the Government not only admits but claims that the motivation of these persons was the making of money for themselves. In the course of his summation Government counsel called attention to a statement claimed to have been made by Cardona to one of the outside accountants helping him and Mrs. Kapraki prepare false statements, "Don't worry that way, you're making money, I'm making some money, everybody is making some money." (20714, see 7580)

The Government claims that in connection with his independent real estate investments or speculations*, Mr. Bernstein paid bribes to the appraiser Goodwin, as is fully developed under our Point V. If Goodwin's testimony could be accepted as the truth, the transactions between Mr. Bernstein and Goodwin were entirely unrelated to the Kapraki, Cardona, Behar *et al.* transactions. There is no evidence, insofar as we know, no claimed evidence that Mr. Bernstein knew that his employees were receiving money from Mrs. Kapraki and no evidence or claimed evidence that Goodwin was aware of this fact or had anything to do with the false statements which Mrs. Kapraki and Cardona were causing to be filed.

A third claimed conspiracy seems to be the one allegedly inv[illegible]g Dun & Bradstreet and its personnel. The Gove[illegible]nceded that there was "no evidence in the case th[illegible] & Bradstreet was aware of the bribery aspect of the [illegible]piracy" (15662). Since the jury disagreed as to Dun & Bradstreet and Mr. Prescott, who had charge of its Hicksville office, we do not expand on this third alleged conspiracy. Months of testimony on this phase of the case intervened between the time that proof in claimed support

* Those unrelated to Eastern Service Corporation.

of the substantive counts against the other defendants had been received and the conclusion of the evidence (Testimony of Dec. 10, 1973 through Jan. 29, 1974; 6447-10551: Testimony of April 23, 1974 through May 2, 1974; 16744-17813).

Accordingly, if the Government's evidence can be accepted, during the period of time covered by the indictment (May 1967 to May 1972) separate conspiracies among different defendants were from time to time formed. An analysis of the object, nature and participants in the respective conspiracies alleged demonstrates that they could not as a matter of pleading or otherwise properly be joined in a single count of an indictment charging one all-inclusive conspiracy. The conspiracies have differing and unrelated purposes. One is claimed to involve the submission of false statements by one group of defendants; another the bribing of FHA employees by other defendants. One conspiracy is claimed to have been primarily for the benefit of Mrs. Kapraki in the sale of her houses. Another is claimed to be for the benefit of Mr. Bernstein for financing his houses. One bore no relation to the other. The testimony in support of the two conspiracies was also different. Most of the testimony in respect to the alleged false statements conspiracy came from Mrs. Kapraki. Most of the testimony as to the alleged bribery conspiracy came from Edward Goodwin. While Mrs. Kapraki testified that on occassion she paid Goodwin money in connection with his appraisal of properties in which she had an interest,* this is clearly insufficient to establish a connection between the two conspiracies.

* He was taking bribes left and right from anybody and everybody. When he was in business for himself he was equally busy paying bribes to others. (13105-13106, 13251-13253)

Although the point that the evidence showed multiple conspiracies, if any, was strongly urged, the Court did not even submit the question to the jury* and refused on request to do so (21595-6, C685-6). This was fundamental error in itself!

We believe that it would be presumptious on our part to attempt an exposition of the law of criminal conspiracy in a brief to this court which has decided most of the pertinent cases on the subject, but we believe a reference to some of the decisions which are decisive when applied to our case is in order. Bearing in mind that it is conceded that Mr. Bernstein had no actual knowledge of the false statements (20640-20641) and that the Government's claim as to him on this phase of the case is that he was negligent in failing to "insure" the truth of statements made by others and failed to exercise "proper credit judgment" we cite *United States v. Crimmins*, 123 F. 2d 271 (2d Cir. 1941) to the effect that one cannot become a member of a conspiracy by negligence.

The agreement of a conspirator as he understands it defines his liability.

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; . . ." *United States v. Peoni*, 100 F. 2d 401, 403 (2d Cir. 1938).

A co-conspirator is not bound by all of the actions of the other co-conspirators, unless the other actions are within the scope of the common undertaking. *United States v. Andolschek*, 142 F. 2d 503 (2d Cir. 1944) (L. Hand, J.); *United States v. Peoni*, 100 F. 2d 401 (2d Cir. 1938).

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* The Court repeatedly charged the jury about "the single conspiracy." (*e.g.* 21284, C368, 21292, C376, 21300, C384)

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter or may have entered, with third persons. That is of course an error . . . ." *United States v. Andolschek*, 142 F. 2d 507.

In *United States v. Vilhotti*, 452 F. 2d 1186, 1190 (2d Cir. 1971), this court said:

> "The fact that this specific intent is not required for a conviction of the substantive crime as it is for the conspiracy, is not at all unique in criminal law and is supported by reason. In United States v. Crimmins, *supra*, 123 F. 2d at 273, Judge Learned Hand pointed out: 'While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light for one cannot agree to run past a light unless one supposes that there is a light to run past.' "*

This court has recently written on the subject of "Single Conspiracy" v. "Multiple Conspiracies" and has stressed the importance of a proper charge marshaling the evidence, and the necessity of focusing the jury's attention on the scope of each defendant's agreement. See, *United States v. Sperling*, 506 F. 2d 1323 (2d Cir. 1974). Interesting, indeed, is this court's statement in the *Sperling* case that,

> "The one saving virtue here was the highly competent manner in which Judge Pollack handled this case from beginning to end—something we have come to expect from him." (fn. 26) 506 F 2d at 1341.

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* Similarly, one cannot conspire to submit false statements if one does not know the statements are false. The Government agreed: "We agree that for this case the law will be that recklessness is not sufficient in the conspiracy count" (18818). The court charged the jury that they could find these appellants "knew" both "objects" of "the single conspiracy" (21284, C368) even though the Goverment did not claim they had actual knowledge of the false statements.

In all charity to the District Judge, but in duty to our clients, we point out that such saving virtue was conspicuously absent in our case.

It is submitted that if the evidence in the present case is reviewed in the light of the principles announced in the cases which we have cited, it would be clear that there has been no proof of the kind that the law requires that would permit Mr. or Mrs. Bernstein or Eastern Service Corporation to be found guilty of conspiracy.

We submit that the conviction of all defendants on all counts should be reversed for the reasons set forth under this point alone. The conspiracy count should fall and with it the substantive counts. The law of conspiracy is complicated enough without leaving a scarecrow in its midst.

Although the Court's charge lasted three days and covers hundreds of pages of the record, only 15 pages relate to the conspiracy charge (21272-21286, C356-70). Contrary to the rule of the cases, he gave the jury no understandable information or instructions with respect to the matters and things that they should consider in reaching a conclusion. Without further argument, we leave it to this court to say whether his instructions in the circumstances were adequate and proper. Certainly his statement at 21284, C386 was not.

POINT VII

Conviction of all defendants on all counts should be reversed because the Court's charge was erroneous and inadequate.

The nature of this complicated and many faceted case placed a clear obligation on the part of the Court to marshal the evidence in its charge to the jury. Almost nine months had elapsed from the time the Government called the first of its witnesses to the time when the Court delivered its charge to the jury. Counsel for Mr. Bernstein and Eastern Service Corporation had concluded their summations more than three weeks before the Court charged the jury. This court has held time and again that in a protracted criminal conspiracy case the Trial Court is required to marshal the evidence in its charge to the jury. This, the Trial Court not only failed to do but stubbornly refused to do, although his charge commenced on June 13, 1974 and concluded on June 17, 1974.

In *United States v. Kelly*, 349 F. 2d 720, 757 (2d Cir. 1965), this court said:

> "In a case such as this one it was particularly important that the proofs be marshalled in such fashion as to place clearly before the jury the difference between the evidence against [the various defendants] (citing cases). The trial judge should not have agreed to the request by counsel that this marshalling of evidence be omitted."*

In *United States v. Aqueci*, 310 F. 2d 817, 829 (2d Cir. 1962), this court stated:

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* *United States v. Kelly* is particularly interesting in view of the fact that all counsel had requested the court not to marshal the evidence. Notwithstanding this fact, this court held the court's failure so to do to be plain error.

> "In a trial of this dimension, each juror is faced with a difficult task in compartmentalizing the evidence with regard to each particular defendant and keeping clearly in mind the full circumstances of each transaction. *It is the function of the judge, in his instructions to the jurors, to marshal the evidence that they have seen and heard presented such that justice may be meted out to the individual rather than to the group.* Our concept of criminal responsibility, like our concept of moral responsibility, is rooted in the individual, his intentions, his motives, and his conduct." (Italics ours.)

Apropos of the above language we call attention to the way in which the Trial Court grouped the defendants in the course of its charge; see, for example, 21284, C368, 21327, C411, 21429, C516, 21457, C544, 21461, C548, 21466-7, C553-4, 21468, C555.* The court grouped the defendants connected with Eastern Service Corporation as if they were one (21284-21287, C368-71). This they were not.

For example, in his erroneous grouping of defendants, contrary to the rule of law, the Judge included Rose Bernstein in the "group", as he put it, "in someway associated with the Eastern Service Corporation". (21327, C411). It is undisputed that Rose Bernstein was neither an officer, director, stockholder or party in interest in Eastern Service Corporation. She was entitled to have the Court make mention of the evidence, indeed marshal it, as affecting her, not as a member of the group but as a basis on which she individually could be found guilty or not guilty. The same can be said for each defendant. We repeat this grouping by the Court was erroneous and calls for a reversal with respect to the defendants so grouped.

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* We would like to review and comment at length on the grouping of defendants by the Court in its charge but time and space do not permit and the best we can do is to cite the above references to the record. Exceptions to the Court's grouping of the defendants appears at 21523, C611.

In the Apalachin case, *United States v. Bufalino*, 285 F. 2d 408, 417 (2d Cir. 1960), this court evidenced the fact that it was less sure than it had been on some occasions in the then past that jurors could analyze, understand and weigh a large quantity of evidence "without considerable study and without voluminous notes and indices." While this was not the ground for reversal, this court noted,

> "Courts have long indulged in the somewhat naive supposition that jurors can properly assess such evidence and determine from it the individual guilt of each of many defendants, even when aided by a careful summary of the evidence such as (the trial judge) gave here."

The Trial Court in our case, far from marshaling the evidence as required in the circumstances, attempted merely to recite a list of witnesses who had been called, with no reference to their testimony (21227, C310, 21238-21247, C321-31). He could not even do this, despite all of his notes and the stenographic transcript which he had at hand. He omitted several of them and became confused as to who were accomplices and who were not. See 21229, C312, 21258, C342 *et seq.* If he couldn't do it with the aid of extensive notes and the stenographic transcript, one couldn't expect jurors to do so, let alone compartmentalize the evidence.

We recall a panel discussion on "The Problems of Long Criminal Trials" held at the Judicial Conference of the Second Judicial Circuit of the United States on September 25, 1963 in which much of the discussion centered around precautionary measures which should be taken to assure the defendants a fair trial in a case such as this one. On that occasion Judge William B. Herlands said:

> "The court is under the duty to marshal the evidence by meticulously reviewing the evidence pro and con with respect to each defendant; by presenting it to the jury with impeccable clarity as to its proper use and limitations; by strictly admonishing the jury to keep the charge, the evidence and the defendants separate; and by scrupulously compartmentalizing the evidence, defendant by defendant." (34 F.R.D. 174)

The charge in the case at bar was a bald one, making little reference to the evidence or placing before the jury in any clear way the issues of fact which the jury was called upon to decide particularly with respect to Rose and Harry Bernstein and Eastern Service Corporation. The contentions of the parties were not mentioned, let alone placed in the context of the evidence. The charge was nothing more than a compendium of abstract legal principles and definitions of terms, some good—some bad. The Trial Judge continued to refuse when requested to deal in any way with the facts. At 19100 the Court said: "I am not going to start getting involved in marshaling the facts." At 19101 the Court said: "I am not going to get involved in that phase of it. I am going to give *definitions of terms,* but I will not get involved in particular reports or mention the names of witnesses or mortgagors or anybody except in the general context of the charge that I am going to make." At 19109 the Court observed that to deal with the facts would "get me into trouble, I am sure."*

Those of us who labor in the vineyard and try to be guided by the decided cases in so doing find it hard to read this court's opinions, such as those we quoted from, and then discover that a rule of law announced as clearly as that of the duty of the trial judge to marshal the evidence

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* If an attempt on the part of the Trial Judge to deal with the facts would get him into trouble, what should be said of the jury, particularly in the absence of proper instructions?

affecting each defendant, may be blithely ignored by a trial judge who we thought was bound by this court's opinions. If this is permitted, then the safeguard considered necessary by this and every court that has written on the subject exists only for the benefit of those who do not need its protection. In the case at bar and with respect to the difficult subject of a criminal conspiracy involving many people and what proof on the subject had been offered, the trial judge said, "I will not marshal the evidence in this case" (21287, C371). He was as good as his word in this respect and did not do so.

The Trial Judge made one of the understatements of the year when he said of his own charge that it was a "very difficult and hard-to-understand charge." (21452, C539) At another time he said, "this particular charge is—part of my charge is quite difficult to follow . . ." (21281, C365) The nature of the case made it difficult and the nature of the case resulted from prosecutorial mismanagement, but nonetheless the nature of the case called for a better effort on the part of the District Judge.

The Court indulged in the obvious at 21185 when he was discussing the false statement counts with counsel and said "if anyone can possibly remember those zeroed-in statements I think is hard to believe."*

This statement of the Court was more than justified; indeed, it was corroborated by the following statement of Government counsel:

> ". . . let's look very briefly at the element of falseness. That is what is the false statement? Of all these files—and you saw them all, they are very thick, these files with *millions of papers* and letters and affidavits and

* No juror could be expected to do so in the case at bar.

> this and that—what is it that the government is contending is false, and what is it that we are asking you to vote on as being false?" (20690-20691)

As this court said in *United States v. Branker*, 395 F. 2d 881, 887-8 (2d Cir. 1968):

> "It is obvious that as the number of counts is increased, the record becomes more complex and it is more difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind. See United States v. Bufalino, 285 F. 2d 408, 417 (2d Cir. 1960). See also Kotteakos v. United States, 328 U.S. 750, 766-767, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)."

As only one illustration of the hopeless confusion that the vast number of counts occasioned, we invite the court's attention to 21467-8, C554-5 of the record. No lawyer, no judge and certainly no jury could follow what the Court was talking about. At this point he rattled off numbers of counts and some of the sections to which they related. Then, speaking of counts, he said,

> "That sounds like we have a total of 51. Of course, that is not so. We actually have 22 different counts, wherein these four defendants are named, in 19 of which the defendant Harry Bernstein is named, for the purpose of this trial; in seven of which Mrs. Bernstein is named; in 21 of which the Eastern Service Corporation is named; and in four of which Mrs. Behar is named."* (21467, C554)

The jury had 64 counts to consider.

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* The Court didn't adequately explain the difference in being "named" in various counts and in being charged in said counts. Confusion was compounded by the fact that certain of these defendants had been severed as to certain counts but remained named in such counts as one of the perpetrators of the crime or crimes alleged. See counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, and 50 as set forth in the court's so-called "memorandum of verdict" (Court's Exhibit 24, C1011-1078).

The Court then added this encouraging word to the jurors: "Here again you do not have to remember all those numbers, because the memorandum of verdict which I will be giving you will be of help." (21467, C554) This mongrel document to which he referred was given to the jury at the conclusion of the Court's charge with a Freudian slip on the part of the judge in describing it as "your memorandum of *guilty* verdict" (Court's Exhibit 24, C1011-1078, 21498, C586). While in the Court's subsequent discussion of this document he said that the jurors could check off "Guilty" or "Not Guilty" under each count; this permission did not undo the damage occasioned by his first description of the document as a "memorandum of guilty verdict".

Since we have heretofore discussed some of the other more fundamental errors of the Court under our various points, we do not repeat such discussion here.

The Court erred in the matter of limiting instructions (*e.g.* 4028-4154, 11400, 11611, 12229) which he gave with respect to statements of co-conspirators and on other occasions erred in his refusal to give limiting instructions (*e.g.* 5399, 10763, 10771, 12216-7, 12221-3, 13032-7, 14230, 14259) which were clearly called for. These errors stemmed from his misconception of the conspiracy charged and attempted to be proved. A discussion of these errors is impossible in the restricted length of this brief but we believe they and their affect will become manifest as the Court examines the record.

The desire for an overkill and an unseemly multiplication and diversity of charges by the Government not only prevented a fair and orderly trial but also inhere to make a proper presentation of all the points that should be raised for appellate review impossible. Time and space do not permit of argument based upon many of the Court's

errors with respect to the admission of evidence during the trial and errors made in its charge. In the circumstances we are obliged to resort to what John W. Davis once called the "courage of selectivity" and to rely upon the perception of the court to see the over-all unfairness of the trial as conceived, structured and tried, particularly as submitted to the jury.

POINT VIII

The conviction of the defendant Harry Bernstein on the bribery counts* should be reversed.

(a) It Was Error not to Sever the Bribery Counts from the Other Counts and not to Sever the Defendant Harry Bernstein from the Other Defendants.

As we have demonstrated, the conspiracy count was not sustained. It was ill conceived in fact and in law. Under the circumstances of this case the defendant Harry Bernstein was greatly prejudiced at the failure to sever the bribery charges against him from the many unrelated charges against him and others.** There was no proof that the bribery counts were in any wise connected with the false statement counts as parts of a common scheme or plan.

The severability of offenses is governed by Rules 8(a) and 14 of the Federal Rules of Criminal Procedure, which in relevant part state as follows:

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* These are counts 35, 38, 39, 41, 42, 44, 46, 48, 50, 51, 53, 55, 57, 59, 63 and 65.

** Timely motions to sever were made in advance of the trial (B186 *et seq.*; B223 *et seq.*) and repeated from time to time thereafter.

"RULE 8

"(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

* * *

"RULE 14

"Relief from Prejudicial Joinder. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendant or provide whatever other relief justice requires."

The interrelation of these controlling principles was succinctly described in *King v. United States*, 355 F. 2d 700, 703 (1st Cir., 1966):

> "Rule 8 is an attempt to set the limits of tolerance, and any joinder which does not fall within it is per se impermissible . . . In addition, Rule 14 provides that, even within the rule [Rule 8], the court may sever for trial if special prejudice appears."

These Rules reflect an accommodation between the contending notions of expeditious criminal law enforcement and the inherent detriment to an accused encountering a trial of multiple offenses. A leading commentator aptly points out (*8 Moore's Federal Practice*—Cipes, Criminal Rules, ¶ 8.02[1], p. 8-3 (1970)):

> "The way in which a prosecutor chooses to combine offenses or defendants in a single indictment is perhaps second in importance only to his decision to prosecute. Whether a defendant is tried en masse with many

other participants in an alleged crime, or in a separate trial of his own, will often be decisive of the outcome. Equally decisive may be the number of offenses which are cumulated against a single defendant, particularly if they are unconnected."

In this regard, § 2.2 of the *Standards Relating to Joinder and Severance*, promulgated by the American Bar Association Project on Minimum Standards for Criminal Justice, provides as follows:

"§ *2.2 Severance of Offenses*

• • •

"(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), should grant a severance of offenses whenever:

"(i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense. . . ."

The great prejudice to the defendant Harry Bernstein to be tried *en masse* with nine other defendants accused of a whole gamut of crimes on their respective parts, is manifest and to discuss it further is simply to labor the point. His conviction on the bribery counts should be reversed for this reason alone.

(b) The Bribery Counts are Duplicitous as to Defendants Harry Bernstein and Eastern Service Corporation.

In no event can the multiple convictions of Harry Bernstein and Eastern Service Corporation stand.* The testimony of the Government witness Goodwin, if accepted as true, establishes that on October 6, 1967 the defendant Harry Bernstein paid him $350 (12281-12282). Goodwin further testified that on October 20, 1967 Harry Bernstein paid him $300 (12490) and on October 27, 1967 $300 (12515-6) and further on December 14, 1967 he was paid $250, plus $300 Christmas money (12659-61, 12686).

The prosecutors, in their zeal for an overkill, have sought to translate the single payment on October 6, 1967 into five separate bribes (Counts 39, 41, 42, 44, 46). They have similarly sought to translate the single payment on October 20, 1967 into two separate bribes (Counts 48, 50) and the single payment of October 27, 1967 into two separate bribes (Counts 51, 53). They also sought to translate the December 14, 1967 payment into two separate bribes (Counts 57, 59). As a result, the defendants Harry Bernstein and Eastern Service Corporation were charged and convicted under 11 counts for bribery in violation of 18 USC § 201(b) as a result of but four payments.

The crime is the payment of money for the purpose condemned by statute. The allocation of the money to several items as the consideration for a lump sum corrupt payment does not thereby convert one crime into several separate crimes. The Circuit Court in *United States v. Canty,* 469 F. 2d 114, 126-127 (D.C.Cir.1972) has held,

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* We believe we have made clear under our Point V that the alleged bribes were not paid for the benefit of Eastern Service Corporation and consequently there was no criminal liability on the part of the corporation.

> ". . . unless a statutory intent to permit multiple punishments is stated 'clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses.' Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 622, 99 L. Ed. 905 (1955). *See also* Heflin v. United States, 358 U.S. 415, 419-420, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959); Ladner v. United States, 358 U.S. 169, 177-178, 79 S. Ct. 209, 3 L. Ed. 2d 199 (1958); United States v. Universal C. I. T. Corp., *supra*."

In *Ladner v. United States*, 358 U.S. 169, 178 (1958), the Supreme Court said:

> "If Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that meaning clear. We thus hold that the single discharge of a shotgun alleged by the petitioner in this case would constitute only a single violation of § 254."

In *Bell v. United States*, 349 U.S. 81, 84 (1955), the Supreme Court said:

> "It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, . . ."

In the case at bar the amount of each payment is alleged to have been computed on the basis of $50 per appraisal paid to Goodwin in behalf of Harry Bernstein. For details, see discussion under Point V, *supra*.

Certainly, one who pays a police officer $100 at the end of a five-day week, computed at $20 per day, for permission to park in a forbidden area, has paid one bribe, not five. An extortionist who knows three secrets concerning someone, who demands and receives $3,000 for not disclosing such secrets, would not be guilty of three separate crimes of extortion on the theory that he charged $1,000 for keeping each of the three secrets.

In the case of Harry Bernstein, joinder of offenses did not fall within either rule permitting a joinder. Certainly the false statement counts, especially as submitted to the jury on the basis of guilt through negligence, could not be said to be the same or similar in character to the bribery charges, nor could the numerous charges of false statements be said to be acts or transactions connected with the bribery counts, all this, to say nothing of the prejudice resulting from the number of each offense charged within the separate classes of offenses.

A trial of Harry Bernstein on the bribery counts would have involved nothing more than the assessment by the jury of the credibility of the amoral Goodwin, an entirely different undertaking from that which the jury was called upon to perform in the circumstances of this case. A head-on confrontation between Goodwin and Mr. Bernstein would present an entirely different case from a nine and one-half months trial on numerous and different classes of offenses.

POINT IX

The conviction of the defendant Rose Bernstein on counts 35, 36, 37 and 38 should be reversed.

We have heretofore developed the reasons why the conviction of the defendants-appellants, including Rose Bernstein, should be reversed on count 1, the conspiracy count. We have also stressed the proposition that a conviction of the defendants-appellants, including Rose Bernstein, on all counts on which she was convicted should be reversed by reason of the scope of the trial and the Court's many errors. Under this point we supplement the reasons why

the conviction of Rose Bernstein on the bribery counts of which she has been convicted should be reversed. The actual charge in each count is that she aided and abetted the payment of a bribe.

Rose Bernstein was not an officer, director, stockholder or party in interest insofar as Eastern Service Corporation was concerned. She had her own independent business. She was not charged in any of the false statement counts. In the counts here under discussion she was charged with aiding and abetting the payment of bribes to the appraiser Goodwin. These were not the bribes her husband was accused of paying and discussed under Point V, *supra,* but bribes paid by Mrs. Kapraki to Goodwin, all unrelated to Mr. Bernstein's properties. In essence, it is charged that Mrs. Bernstein caused the F. H. A. appraisers Jankowitz and Goodwin to be assigned to appraise some of Mrs. Kapraki's properties* and thus aided and abetted the bribing of them by Mrs. Kapraki.

All that we have urged under the next preceding point with respect to the improper joinder of offenses and the prejudicial joinder of parties applies to the above counts of the indictment against Rose Bernstein. Her conviction should be reversed because of such improper and prejudicial joinder of offenses and of parties. In fact, the prejudice to Rose Bernstein through the impermissible joinder of offenses and parties is even more aggravated because of her attenuated connection with the alleged crimes. Whatever evidence there may have been that she learned of the bribe payments made to Goodwin after the payments is not sufficient to prove aiding and abetting on her part.

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* Jankowitz was acquitted (21668-9, C761-2). Mrs. Bernstein was acquitted under counts of aiding and abetting an alleged bribery of Jankowitz, (21902-3, C986-7) and she was acquitted of having bribed Goodwin. (Count 62, 21903, C987)

As we have similarly pointed out in the case of Harry Bernstein, the trial of Rose Bernstein on specific counts of aiding and abetting payment of a bribe or bribes to Goodwin, involving the credibility of the witness against her on the subject, would be quite different from the nine and one-half months trial which she sat through while joined with other defendants, including her husband, on a host of charges unrelated to the crime she is alleged to have aided and abetted, grouped with her husband and others whenever the Court mentioned her name. She was circumstanced as was the defendant Shuck in *United States v. Kelly*, 349 F. 2d 720 (2d Cir. 1965). Much of this court's discussion of Shuck's situation at page 756 *et seq.* of the opinion in the *Kelly* case might well have been written about Mrs. Bernstein in our case.

Not only was there a failure of proof of guilt as to her with respect to the counts we are discussing but the Court did not discharge its responsibility to give the jury the "required guidance of lucid and relevant legal criteria" which would lead to her conviction or acquittal.* As we have said, she was grouped with others every time she was mentioned. See, for example, 21327, C411, 21491, C579. Not only was she continually grouped with her husband Harry Bernstein, Florence Behar and Eastern Service Corporation, and sometimes with Melvin Cardona,** but nowhere in the Court's charge was the case against her separately discussed or even mentioned.

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* *United States v. Clark*, 475 F. 2d 240, 251 (2d Cir. 1973).

** Cardona wasn't even charged with complicity in the bribery count but only in the false statement counts in which it is conceded Rose Bernstein played no part. The false statement counts against her were dismissed at the end of the government's case without opposition (15487).

The Court's charge on the subject of aiding and abetting the payment of bribes was clearly erroneous. The Court charged in substance that if the jury was convinced beyond a reasonable doubt that a payment was made, conviction must follow (21492, C580). We quote from the Court's charge verbatim on the subject, "If you are convinced beyond a reasonable doubt that the payment was so made, then you must convict the defendant or defendants on that count" (21492, C580). He did not discuss with the jury, let alone instruct the jury, as to what act or acts were claimed to be or could be considered acts of aiding or abetting, or did he give any instructions as to what finding by the jury, beyond the mere fact of payment of the bribe, was necessary for conviction. Since there was no dispute as to the fact that Mrs. Kapraki paid bribes to Goodwin, the charge with respect to the counts we are discussing amounted to an erroneous direction of a verdict of guilty.

The defendants' exception to the Court's charge on the subject of aiding and abetting appears at 21523, C611, 21529, C617, 21548-50, C636-8, 21561, C650, 21574, C663, 21582, C671.

POINT X

The conviction of the defendant Harry Bernstein on counts 35 and 38 should be reversed and the conviction of Eastern Service Corporation on counts 35, 36, 37 and 38 should be reversed.

These counts, like the counts involving Mrs. Bernstein, discussed in our next preceding point, contain charges of aiding and abetting Mrs. Kapraki to bribe Goodwin in connection with Mrs. Kapraki's properties. Under no circumstances and on no theory could the defendant Eastern

Service Corporation be found to have aided and abetted these alleged transactions. The alleged bribes were solely for the benefit of Mrs. Kapraki. Accordingly, our discussion under this point is more particularly concerned with Mr. Bernstein. All that we have urged under the next two preceding points is applicable here. The joinder of these counts with the other counts was impermissible and the joinder of Mr. Bernstein and Eastern Service Corporation with the other defendants involved in these counts was highly prejudicial.

Furthermore, all that we have pointed out with respect to the inadequacy of the Court's charge and its failure to instruct the jury with respect to the aiding and abetting counts applies in all its significance to Mr. Bernstein and Eastern Service Corporation. The Court's charge on the subject of aiding and abetting appears at 21481-21484, C569-72, 21492-21494, C580-82. As we have pointed out in the case of Mrs. Bernstein, the jury was neither adequately nor properly instructed with respect to the findings necessary on which to base a conviction for aiding and abetting. The Court, in substance, told the jury that if they found a bribe was paid there *must* be a conviction of the *defendants* charged with aiding and abetting the payment (21492, C580).

Again we have the pernicious effect of the grouping of defendants and the complete failure to put an individual defendant's case before the jury in the context of the evidence affecting the defendant.

Conclusion

If we seem to have jumped confusingly from one subject to another as we have attempted to discuss the various categories of counts as affecting the different defendants it has been because of the scope and nature of the case. Perhaps this will help demonstrate the impossibility on the part of a juror to hear, remember, analyze, compartmentalize, weigh and apply evidence pertaining to sixty-five counts and nine defendants after months of testimony, weeks of summations and days of a labyrinth of legal definitions and abstract legal principles—all without notes, papers, pencils or memory aids of any kind or description.

For all the reasons hereinbefore stated, the judgments of conviction should be reversed.

Dated: Buffalo, New York, March 18, 1975.

Respectfully submitted,

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ADDENDUM A

FEDERAL HOUSING ADMINISTRATION TRANSACTIONS

(18 U.S.C. 1010)

On or about the .... day of ....., 19.., in the ..... District of ....., JOHN DOE, for the purpose of obtaining a loan from ....., a corporation, for improvements upon the premises of Richard Roe at ..... Street, ..., with the intent that such loan would be offered to and accepted by the Federal Housing Administration for insurance, did wilfully and knowingly make, pass, utter and publish and cause to be made, passed, uttered and published to the said ....., a certain false statement in a document, that is, a Federal Housing Administration Title I Completion Certificate over the signature of Richard Roe, as borrower, and ..... Co. and JOHN DOE, its president, as dealer, wherein the said Richard Roe and ..... Co. and JOHN DOE certify that it has not been represented to the borrower that he will receive a cash payment or rebate, JOHN DOE well knowing that at the time the said statement was made, passed, uttered and published, the said statement was false in that it had been represented to the borrower that he would receive a cash payment or rebate.

STATEMENTS OR ENTRIES GENERALLY

(18 U.S.C. 1001)

First clause

On or about the ..... day of ....., 19.., in the ..... District of ....., JOHN DOE wilfully and knowingly concealed and covered up by a trick, scheme and device, a material fact in a matter within the jurisdiction of the ....., an Agency of the United States, in that he, well knowing that Agency had ordered from the ..... Company approximately (64,793) pounds of meat to be delivered to the said ....., diverted and withheld from said shipment approximately (17,832) pounds of meat with the intent to convert the same to his own use, and concealed and covered up the material fact of such diversion and conversion by the trick, scheme and device of causing to be signed and causing to be issued by the said Agency a receipt to the ..... Company for approximately (64,793) pounds of meat.

See *United States v. Moore,* 185 F. 2d 92 (C.A. 5, 1950); *Chevillard et al. v. United States,* 155 F. 2d 929, 932, 933 (C.A. 9, 1946)

STATEMENTS OR ENTRIES GENERALLY

(18 U.S.C. 1001)

Second clause

On or about the .... day of ....., 19.., in the ..... District of ....., JOHN DOE, wilfully and knowingly did make and caused to be made a false, fictitious and fraudulent statement and representation as to material facts[1] in a matter within the jurisdiction

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[1] Whether the element of materiality is required by the second clause of section 1001 is a question upon which there is a sharp conflict of opinion. See the cases cited at fn. 3, page 464 in *United States v. Quirk*, 167 F. Supp. 462, aff'd. 266 F. 2d 26. Two Circuit Courts have held that there must be proof of materiality even under the second clause, *Rolland v. United States*, 200 F. 2d 678 (C.A. 5) and *Freidus v. United States*, 223 F. 2d 598 (C.A.D.C.). But see *United States v. Silver*, 235 F. 2d 375, 377, cert. den. 352 U.S. 880 (C.A. 2); *Poonian v. United States*, 294 F. 2d 74, 75 (C.A. 9).

One case which indicates that an indictment for a false statement under the second clause must contain an allegation of materiality is *Rolland v. United States, supra*, 200 F. 2d 678, 668 [sic] (C.A. 5). That decision, though it speaks in terms of failure to allege and prove materiality, held in substance that the false statement was not "in [a] matter within the jurisdiction of a department or agency of the United States." This becomes clear when *Rolland* is read in the light of *United States v. Moore*, 185 F. 2d 92 (C.A. 5) which the *Rolland* decision cites. Materiality was discussed in *Moore* since the violation charged was under the first clause which requires materiality. However, the principal issue in *Moore* was whether the false statements were in a matter within the jurisdiction of the Wage and Hour Division, and the Fifth Circuit held in *Moore* and reaffirmed in *Rolland*, that in making preliminary investigations to determine whether the employees of a business are covered by the Fair Labor Standards Act, the Administrator of the Wage and Hour Division is not exercising the jurisdiction conferred on him by the Act. The technical pleading issue was not central to the decision in *Rolland*.

See also *United States v. Miller*, 246 F. 2d 486; *Todoron v. United States*, 173 F. 2d 439; *United States v. Okin, et al.*, 154 F. Supp. 553; *United States v. Lange*, 128 F. Supp. 797; *United States v. Mamber*, 127 F. Supp. 925; *United States v. Varano et al.*, 113 F. Supp. 867; *United States v. Kaskel, et al.*, 18 F.R.D. 477; *United States v. Meyers*, 18 F.R.D. 299.

(Footnote continued on following page)

of the (Immigration and Naturalization Service), an agency of the United States, in that in an application for (extension of time of temporary stay), submitted to the said ....., JOHN DOE stated and represented that he had not been employed or[2] engaged in business since his arrival in the United States, whereas in truth and fact, as he then knew, he had been employed and engaged in business since his arrival in the United States.

(Footnote continued from preceding page)

The suggested form includes an allegation of materiality. In most, if not all, cases the statements ultimately proved will certainly be material. Therefore, there is no compelling reason not to charge materiality. United States Attorneys will, if they determine any particular situation requires such action, follow the controlling decisions in their Districts. However, in view of recent pronouncements by the Supreme Court in related areas, the Criminal Division doubts that materiality is not an essential element of the offense under clause two of section 1001.

[2] The use of "or" in these circumstances is proper.

STATEMENTS OR ENTRIES GENERALLY

(18 U.S.C. 1001)

Third clause

On or about the .... day of ....., 19.., in the ..... District of ....., ..., a corporation, and JOHN DOE, its ....., in a matter within the jurisdiction of the Department of ..... of the United States, did wilfully and knowingly use a false writing and document containing a false, fictitious and fraudulent statement, knowing the same to contain such a statement, in that in a statement of costs, submitted to the said Department* in connection with the production of ..... by the defendant under a contract with the United States containing a price redetermination clause, the defendant stated and represented that the sum of ..... had been paid to ..... for engineering services rendered in such production, whereas in truth and fact, as the defendants then knew, neither the sum of ..... nor any amount had been paid to ..... for such services.

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* It is not essential that in all cases the documents be presented to the government. See, *e.g., Ebeling v. United States,* 248 F. 2d 429, 433, (C.A. 8, 1957).

PUBLIC HOUSING ADMINISTRATION TRANSACTIONS

(18 U.S.C. 1012)

First paragraph

On or about the .... day of ....., 19.., in the ..... District of ....., JOHN DOE, knowingly and with intent to defraud, did make and cause to be made a false statement and report as to material facts to the Public Housing Administration, an agency of the United States, in that in a report in relation to project ..... designated "Operating Statement", submitted to the said Administration, JOHN DOE, as Executive Director of the ..... Housing Authority of the City of ....., ...,[1] included, as an expense of said project, the sum of ..... purportedly paid to ....., a corporation, for ..... services rendered such project, whereas in truth and fact, as JOHN DOE then knew, no portion of the funds of the project had at any time been expended for that purpose.

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[1] The statute is not limited in its application to employees of the Housing Administration. *Blum v. United States*, 212 F. 2d 907, 911 (C.A. 5, 1954). Cf. *Henslee v. United States*, 262 F. 2d 750 (C.A. 5, 1959).

LOAN AND CREDIT APPLICATIONS GENERALLY

(18 U.S.C. 1014, as amended)

On or about the ..... day of ....., 19.., in the ..... District of ....., JOHN DOE knowingly did make a false statement of a material fact* upon an application for a loan submitted to the ....., an agency of the United States, for the purpose of influencing the ..... to approve such loan, in that JOHN DOE stated and represented therein that the then market value of a certain security, that is, ..., offered by JOHN DOE as security for such loan, was ....., whereas in truth and fact, as he then well knew, the said security was worthless.

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* See the notes under section 1001.

AFFIDAVIT OF SERVICE BY MAIL

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County of Genesee) ss.:
City of Batavia)

RE: United States
v
Bernstein et al
Docket No. 74-2328

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

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Leslie R. Johnson

Sworn to before me this

18 day of March, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1975